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89-1898

CAUSE NO.

In The

United States Supreme Court

OCTOBER 1989 TERM

BELL & MURPHY AND ASSOCIATES, INC.,
JOHN W. BELL, JR., HAROLD D. BARNETT,
ROBERT D. HAMER, JR., AND RICHARD L. MEARS,
PETITIONERS,

VS

FEDERAL DEPOSIT INSURANCE CORPORATION, AS
RECEIVER FOR FIRST REPUBLICBANK DALLAS, N.A.
(F/K/A FIRST REPUBLICBANK GATEWAY, N.A.),
NCNB TEXAS NATIONAL BANK, N.A., AND
CHARLES E. JOBE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QESTIONS FOR REVIEW

1. Does the common law doctrine of *D'Oench, Duhme & Co., v. FDIC,* 315 U.S. 447 (1942) bar Petitioners' causes of action against the FDIC?
2. Does the fact that the agreement was in writing in the form of a letter from the Bank take it out of the purview of *D'Oench?*
3. Is the *D'Oench* doctrine limited to agreements which diminish the FDIC's interest in a specific asset acquired from a bank?
4. Does *D'Oench* require a showing of some sort of fault on the part of the party opposing the FDIC?
5. Are the lower court's rulings on questions 3. and 4. above supported by precedent?
6. Does the fact that the agreement established on its face bilateral obligations take it out of the purview of *D'Oench?*

LIST OF PARTIES

All parties are listed in the caption of this petition.

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REFERENCE TO APPELLATE COURT'S OPINION

The Fifth Circuit did publish an opinion in this case which appears at 868 F.2d 750 and is appended hereto.

STATEMENT OF JURISDICTION

On February 21, 1990, the Fifth Circuit Court of Appeals issued and entered judgment affirming the judgment of the trial court in this litigation. This Petition is presented to this Court pursuant to 28 U.S.C. Sec. 1254 (1).

CITATION OF RELEVANT STATUTE

Although not controlling, 12 U.S.C. Sec. 1823(e) is relevant to the issues in this petition. The statute is set out below.

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

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STATEMENT OF THE CASE

A. *Course of proceedings*

This case originated in the courts of the State of Texas. Bell & Murphy and Associates and the individual Petitioners (collectively hereinafter "Petitioners") filed suit in the 352d District Court of Tarrant County, Texas. The defendants to the suit were originally Interfirst Bank Gateway, N.A. and its president, Charles E. Jobe. Subsequently,

Interfirst bank became First Republicbank Gateway, N.A., and then the First Republicbank system failed. The FDIC became receiver of the failed bank, and NCNB Texas National Bank acquired First Republicbank. Due to this course of events, FDIC and NCNB became parties to this litigation.

FDIC then sought removal of the suit to the United States District Court for the Northern District of Texas, Fort Worth Division. The removal petition was amended to include Jobe, and eventually the removal petition was granted.

FDIC and NCNB next moved for dismissal for failure to state a claim. The motion was based on *D'Oench, supra,* and 12 U.S.C. Sec. 1823(e). The District Court granted the motion.

Petitioners appealed that decision to the Fifth Circuit, which upheld the trial court's judgment.

B. *Statement of facts*

The facts which form the basis of this suit appear below. Many of these facts are allegations in Petitioners' Original Petition; however, since the case was dismissed for failure to state a claim, these allegations must be accepted as true. *Jenkins v. McKeithen,* 395 U.S. 411, 421-422 (1969).

The Court should be aware that several different bank names are involved, but regardless of what names are applicable at what times, there is but one bank which engaged in the conduct which is the basis of the suit. Therefore, in order to avoid confusion, this petition will henceforth refer to "Bank" unless it is necessary to use a specific name.

The facts are as follows. Petitioners' business involved consultation and exploration in oil and gas. Due to the

nature of the Texas economy and the oil and gas industry, Petitioners began experiencing substantial financial difficulties in 1985.

At that time, Petitioners had a seventeen-year history of doing business at the Bank. Petitioners sought assistance from the Bank, and the parties reached an agreement. That agreement is not the basis of this suit. The agreement was nonetheless breached by the Bank.

The Bank demanded a new agreement, and Petitioners, given their condition and actions in reliance of the initial agreement, had no choice but to accept the Bank's demands. This new "agreement" was accepted by Petitioners under economic duress.

After the revised agreement became effective, the Bank demanded additional terms. Again, Petitioners were forced to comply with these new terms under economic duress.

The terms of the agreement were as follows. Petitioners' accounts receivable would be paid to the Bank. Petitioners would obtain loans from their pension and profit sharing plans, and these funds would then be loaned to Bell & Murphy and Associates (hereinafter "BMA"). BMA would in turn give these funds to the Bank. Two-thirds of these funds would be retained by the Bank and applied to BMA's outstanding debt with the Bank. The other one-third would go to the IRS for back payroll taxes. BMA would change its pay period to semi-monthly and reduce pay of all officers and other employees. In return, the Bank was to honor checking overdrafts for payroll checks, checks to the IRS, and checks for necessary operating expenses. These overdrafts were essentially covered in that the Bank had possession of all of BMA's accounts receivables. Also, BMA was to have been able to operate without limitation. The Bank was

obligated to work with BMA as long as Petitioners complied with the agreement.

The above agreement was in writing in the form of a letter from Jobe.

Petitioners complied with all the terms of the agreement; however, the bank breached the agreement. The Bank in effect used all of the money from the pension and profit sharing plans and the accounts receivable only to reduce Petitioners' indebtedness to the Bank as quickly as possible. Such action was taken in total disregard to whether BMA survived as a business.

The Bank's misrepresentations, mismanagement, and breach of the agreement effectively destroyed Petitioners' business.

The only asset of the Bank that was involved and could have been affected in any way by the agreement was Petitioners' outstanding indebtedness to the Bank. The Petitioners' pension and profit sharing plans had no connection to the Bank. Also, Petitioners have never sought to avoid any obligation to the Bank.

ARGUMENT

I. *REASONS FOR ALLOWANCE OF WRIT*

The lower court's rulings conflict with rulings from other Circuits regarding the following issues: 1) whether *D'Oench* applies only to agreements adversely affecting the FDIC's interest in specific assets acquired from a bank, and 2) whether *D'Oench* requires a showing of some sort of fault on the part of the party opposing the FDIC.

The above issues have not been settled by this Court, and Petitioners urge that they are important issues of federal

law which should be settled by this Court, particularly given the conflicts among the Circuit courts.

Petitioners further maintain that the appellate court's ruling on the "specific asset" issue is unsupported by precedent, and thus constitutes an unjustified and incorrect expansion of the *D'Oench* doctrine. Petitioners feel this Court should review such decision before allowing a lower court to create new law which might be in conflict with existing law.

The concerns expressed in the previous paragraph also apply to the appellate court's ruling on the fault issue.

The above reasons for allowing the writ are explained in detail below.

II. *SUMMARY OF SELECTED CASE LAW*

Petitioners have summarized cases which are pertinent to this cause. Many of these cases are the more prominent and most often cited cases regarding D'Oench and its statutory counterpart. Petitioners do not represent that their list of summaries is conclusive; however, they have made a good faith effort to find cases which address the issues raised herein, and they are not purposely omitting cases which do not support their arguments.

These summaries are intended to serve as a ready aid in analyzing Petitioners' arguments. Many of the cases are applicable to several different issues herein, and rather than explain the circumstances of a given case several times, Petitioners felt the requirements of brevity and conciseness would be better serve by summarizing the cases here and simply referring to those cases in the Argument.

Langley v. FDIC, 108 S. Ct. 396 (1987).

This decision was based on 12 U.S.C. Sec. 1823(e), but this Court relied on *D'Oench* in interpreting the statute.

The pertinent facts were 1) the Langleys signed facially unqualified promissory notes, 2) the FDIC attempted to enforce the notes, 3) the Langleys claimed the notes were invalid due to fraud in the inducement, and 4) such alleged fraud served as the basis for a counterclaim.

This Court rejected the Langleys' fraud claims on the basis of *D'Oench.* This Court found that the alleged misrepresentations and subsequent execution of the notes constituted a "scheme or arrangement" under *D'Oench. Id.* at 402. The Court stated:

> Certainly, one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counterpromise (as in *D'Oench, Durme*) or of the truthfulness of a warranted fact. *Id.*

Petitioners submit that the Langleys' claims, including the counterclaim, were barred because their "agreement" would alter the plain terms of their obligation. Regarding the counterclaim, Petitioners point out that it was based on an agreement, which if allowed, would have adversely affected a specific asset.

FDIC v. Powers, 576 F. Supp. 1167 (N.D. Ill. 1983).

The impact of this case is shown in two excerpts from the opinion. The first excerpt states:

> The FDIC sues Powers on a facially sufficient guarantee, and he wishes to defend on the basis of informal, unwritten arrangements and understandings between him and [bank] officials. *Id.* at 1171.

Powers signed the guarantee in blank, and he claimed that there was no agreement to use the instrument to guarantee the debt in issue. *Id.* at 1169. This defense was held barred. *Id.* at 1171.

The "understanding" was that the blank guarantee was not to be used to secure the debt in issue. Just as was the case in Langley, the unrecorded "agreement" sought to alter the plain terms of a written obligation, and thus was illegal.

The second pertinent excerpt reads as follows:

> In *D'Oench,* the Supreme Court made clear the invalidity of defenses arising from defendants' *complicity* in a secret, irregular arrangement, even if the defendants' actions did not amount to fraud or illegality. *Id.* at 1171-1172 (emphasis added).

FDIC v. Hatmaker, 756 F.2d 34 (6th Cir. 1985).

Here is another case in which the borrower was attempting to avoid an obligation. The case was decided pursuant to 12 U.S.C. Sec. 1823(e), but is useful in interpreting the *D'Oench* doctrine.

In rejecting a defense based on a side agreement, the court said, "That such an agreement might have been fraudulently induced is immaterial; what is important is that the borrower *voluntarily* entered into such an agreement." *Id.* at 37 (emphasis added).

FDIC v. Castle, 781 F.2d 1101 (5th Cir. 1986).

This case is similar to *Hatmaker* in that the defendant was attempting to avoid liability on a note and the ruling was based on Sec. 1823(e). However, this case is also relevant to the *D'Oench* doctrine. The court relied on *Hatmaker* in ruling that fraudulent inducement of an agreement is irrelevant if the agreement was entered into voluntarily. *Id.* at 1107.

FDIC v. LeFeve, 676 F. Supp. 764 (S.D. Miss. 1987).

The defendant tried to avoid paying an amount owed to FDIC under a deed of trust. The court rejected the defendant's defenses, holding that "fraud by the lending institution does not alter the fact of *knowing participation* in the misleading arrangement," *Id.* at 769 (emphasis added), and "nor does lack of intent to defraud on the part of the debtor a[l]ter the fact of the debtor's *participation....*" *Id.* (emphasis added).

The court also cited with approval the above cited portions of *Hatmaker* and *Castle. Id.*

FDIC v. Investors Associates X., Ltd., 775 F.2d 152 (6th Cir. 1985).

The defendants were trying to avoid liability on two promissory notes. They signed blank notes based on a promise that the notes would not be enforced. This promise, or agreement, was the basis of their defense, and was found to be an arrangement likely to mislead the banking authorities. *Id.* at 155. The agreement sought to alter the plain terms of a facially sufficient document.

The court also held that *D'Oench,* at 315 U.S. 461, "explicitly stated that the maker would be liable even if 'ignorant of the fraudulent scheme, so long as he was *responsible* for the creation of the note.'" *Id.* at 154 (emphasis added).

FDIC v. Vestring, 620 F. Supp. 1271 (D.C. Kan. 1985).

FDIC sued on certain promissory notes. Defendants claimed no liability due to fraud in the inducement, estoppel, and failure of consideration. They also raised counterclaims based on the breach of an oral agreement with the bank and fraudulent misrepresentations by an agent of the

bank. The court rejected all defenses and counterclaims under *D'Oench,* saying that "it is clear that by entering into an oral agreement which contradicted the terms of the written note, the defendants did *lend* themselves to a deceptive secret agreement." *Id.* at 1273 (emphasis in original).

FDIC v. Cardinal Oil Well Servicing Co., Inc., 837 F.2d 1369 (5th Cir. 1988).

Fraud in the inducement was found to be no defense to the enforcement of certain guaranties because "the guarantors simply assert an oral side agreement not to enforce the guaranty agreements in accordance with their express terms." *Id.* at 1372.

Also, the guarantors could have revoked the guaranties at any time in writing. "By leaving unrevoked guaranties with the bank, the guarantors lent themselves to an arrangement which would tend to mislead the FDIC." *Id.*

FDIC v. McClanahan, 795 F.2d 512 (5th Cir. 1986).

McClanahan signed a blank promissory note, then delivered it to a man he knew had been convicted of bank fraud. When problems arose regarding this note, McClanahan only contacted this same man, who then forged McClanahan's signature on a renewal note. The court ruled that McClanahan's conduct was reckless, and thus his defenses of failure of consideration and fraud in the inducement were barred by *D'Oench. Id.* at 516-517.

Chatham Ventures, Inc. v. FDIC, 651 F.2d 355 (5th Cir. 1981).

The borrowers brought an action against FDIC challenging FDIC's right to collect on a note executed by borrowers. FDIC counterclaimed for enforcement of the note. The borrowers contended that the note was part of a joint venture

agreement with the lender under which the lender was to loan additional funds to borrowers. The lender never advanced these additional loans, and the borrowers argued that the lender thus breached the joint venture agreement, thereby relieving them of liability on the note. The alleged joint venture agreement, however, was only oral; therefore, it could not be asserted against FDIC. *Id.* at 362.

Please note that the borrowers were attempting to avoid liability on a specific asset, and had they prevailed on their claim a specific asset would have been adversely affected.

FSLIC v. Murray, 853 F.2d 1251 (5th Cir. 1988).

The defendants signed facially unqualified notes. As a defense to the notes, they asserted an agreement by the lender to fund additional loans and release them from liability upon sale of their shares of a partnership. Relying on *Langley, supra,* the court rejected this argument because it was based on an agreement which made facially unqualified notes subject to an unwritten and unrecorded condition. *Murray, supra,* at 1255.

Defendants also signed certain signature pages in blank. They claimed that these pages were later appended to documents other than those they intended to sign. This defense was rejected pursuant to *McClanahan, supra,* because such conduct was found to be reckless. *Murray, supra*.

Beighley v. FDIC, 868 F.2d 776 (5th Cir. 1989).

This case involved an affirmative claim by the borrowers based on the breach of an agreement by the lender to finance the purchase of certain property to a third party.

The decision is based on *Murray, supra*. The court made the following statements:

> We recently applied the *D'Oench, Duhme* doctrine to defeat an attempt by the makers of a note to

> *escape liability* by asserting that the lender violated an oral agreement to fund additional loans. *FSLIC v. Murray,* 853 F.2d 1251, 1255 (5th Cir. 1988). *Beighley, supra,* at 784 (emphasis added).

and

> Like the agreement in *Murray,* [the bank's] alleged oral agreement to finance future loans is not clearly evidenced in the bank's records, and would not be apparent to bank examiners. *Id.*

FDIC v. Huston, 1988 W.L. 97621 (N.D. Tex. 1988).

FDIC sought enforcement of guaranties against defendant Huston. Huston asserted as a defense an agreement that the guaranties were not to be enforced, and he claimed he signed the guaranties only because of that agreement. He also asserted a counterclaim based on the same agreement.

The key element in the decision is that Huston *voluntarily aqreed* to enter into the agreement and sign the guaranties. *Id.* at 6, 17 of slip opinion (attached). The court ruled that

> Thus if defendant Rex Huston was allowed to assert his side agreement as a basis for his counterclaim....he would be "relying on his *own wrongful act* to defeat the obligation of the note as against the receiver of the bank." *Id.* at 15, quoting *D'Oench* (emphasis added).

The court also stated that if Huston proved his counterclaim, the "FDIC's recovery on the *notes and guaranties* would be substantially less." *Id.* at 16 (emphasis added). In other words, the court linked recovery on the counterclaim to an adverse effect on a specific asset.

III. *AGREEMENT IS IN WRITING; THEREFORE IT IS NOT BARRED BY D'OENCH.*

It is a fact that the agreement was in writing in the form of a letter from Jobe, the Bank president. As a result, the

Bank did have a written record of the agreement, and Petitioners argue that such fact takes the agreement out from under *D'Oench.*

IV. *D'OENCH IS LIMITED TO AGREEMENTS ADVERSELY AFFECTING SPECIFIC ASSETS.*

On page 753 of its opinion, under headnotes 3 and 4, the Fifth Circuit analyzes — and dismisses — Petitioners' primary argument in both the trial and appellate courts. The opinion correctly summarizes the argument by saying that "the *D'Oench, Duhme* rule bars only claims or defenses based upon unrecorded side agreements that defeat the FDIC's interest in a *specific asset* acquired from a bank." *Bell & Murphy v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 753 (5th Cir. 1990) (emphasis in original).

The *sole* authority on which the Fifth Circuit dismissed this argument was *Beighley, supra*. Petitioners will show that Beighley was an incorrect decision and/or an unjustified extension of the *D'Oench* doctrine.

Several aspects of *Beighley* serve as the foundation for the analysis below. The Beighleys instituted the litigation by suing the lender for breach of an agreement to finance a third party purchase of certain property. The FDIC eventually counterclaimed to enforce a note held by the FDIC. The appellate court held that the Beighleys' affirmative claims based on the agreement were barred by *D'Oench*.

Beighley is not supported by precedent. The actual application of the *D'Oench* doctrine in the *Beighley* opinion appears in two paragraphs on page 754. In those two paragraphs, three cases are cited, and only one of those addresses any of the relevant facts.

That one case is *Murray, supra*. The two cases are similar only in that they both involve agreements to finance some

sort of future loans. There is, however, a controlling difference. The borrowers in *Murray* were asserting a side agreement in order to *avoid liability* on a note held by the FDIC. As a result, the agreement necessarily would have adversely affected a *specific asset* held by the FDIC. In their suit, the Beighleys were not asserting a side agreement in order to avoid liability on a note. The Court will note that the agreement did eventually become the basis for defending liability on the note, but only *after* the FDIC filed a counterclaim for enforcement of the note. Petitioners argue that this fact alone renders *Murray* inapplicable to *Beighley* because the agreement in *Beighley* did not and could not relate to a specific asset. Therefore, *Beighley* is incorrect and cannot serve as authority for the judgment before this Court for review.

A closer look at *Murray* clearly shows that it is inapplicable to *Beighley*. The *Murray* court's specific ruling on the agreement to fund additional loans, *Murray, supra* at 1255, appears to be based on *Langley, supra,* thereby making it totally inapplicable to *Beighley* (in turn causing *Beighley* to be inapplicable to the case at bar). The agreement in *Langley* sought to alter the written terms of an unqualified note. The agreement in *Beighley* did not change the terms of the Beighleys' obligation. As stated, the Beighleys brought a suit for damages based on the breach of the agreement. They did not assert the agreement as an attempt to change or avoid the note until the counterclaim was filed, and those defenses were held barred by statute, not *D'Oench*. Also, the defenses necessarily related to a specific asset. The affirmative claim did not relate to a specific asset (if it did relate to a specific asset, then the appellate court's ruling in this case is clearly unsupported by precedent, for reasons which will be clearly explained in the conclusion of this argument). Consequently, any argument that *D'Oench* was applied to the

affirmative claim because the Beighleys were trying to avoid liabilty is meritless. It follows that the Beighleys' affirmative claims based on the agreement did not seek to change or alter their obligation on the note. Therefore, *Langley*, and hence *Murray*, is inapplicable to the facts of *Beighley*.

If the *Murray* court's ruling on the agreement to fund loans is not based on *Langley*, then it can only be based on *D'Oench*. After quoting a passage from *Langley*, the *Murray* court states

> Alliance's alleged oral agreements to fund additional loans and to release the Hintons from liability are simply secret side agreements that the Court invalidated almost fifty years ago in *D'Oench*, 315 U.S. at 460, 62 S. Ct. at 680. *Id.* at 1255.

There are several things to say in regard to the above passage. First, *D'Oench* alone does not support the Fifth Circuit's ruling in the case at bar. *D'Oench*, by its own terms, is limited to agreements which adversely affect specific assets. It is well established that the agreement in *D'Oench* concerned a specific asset, namely a note. Furthermore, it is without question that the agreement would have defeated the FDIC's interest in that specific asset. Therefore, the specific holding in *D'Oench* does not support any argument that the *D'Oench* doctrine is not limited to agreements which adversely affect a specific asset. The conclusion to be reached is as follows: 1) if the ruling in *Murray* regarding the agreement to fund future loans is based solely on *D'Oench*, then the ruling in *Beighley* is also based solely on *D'Oench*; 2) *D'Oench* alone does not support a ruling that the doctrine is not limited to the effect on specific assets; and 3) the ruling in *Beighley* is unsupported by precedent because the agreement there could not be shown to adversely affect a specific asset.

The bottom line is that the agreement to fund additional loans in *Murray* was barred because it either 1) was an unwritten agreement which sought to change the written terms of the note being sued upon, or 2) would otherwise have an adverse effect on a specific asset — the note being sued upon. The agreement to fund future loans in *Beighley* did not, and could not, have either of these effects. Consequently, the *Beighley* court's reliance on *Murray* is misplaced. This fact in turn means that there is no precedent supporting the ruling in *Beighley*. Stated differently, *Murray* is inapplicable to *Beighley*, and *Beighley* is in turn inapplicable to the case at bar.

The preceding analysis shows that *Beighley* does not support the Fifth Circuit's ruling that *D'Oench* is not limited to agreements that defeat the FDIC's interest in a specific asset. Such a result is very significant not only because *Beighley* is the sole authority cited for such ruling, but also because there are no other cases which support the ruling. With the exception of *Beighley*, all the cases discussed in the previous section of this petition involved agreements which would *adversely* affect the FDIC's interest in a *specific asset*. Petitioners do not know of any case other than *Beighley* in which *D'Oench* barred an agreement that did not adversely affect a specific asset.

Petitioners argue primarily that the judgment in question is not supported by precedent in any way, and should therefore be reversed. However, Petitioners argue further that there is no legal basis for the formation of a rule that *D'Oench* is not limited to agreements adversely affecting specific assets. The foundation of this argument is the language of 12 U.S.C Sec. 1823(e). Even though the statute is technically inapplicable (since the FDIC is acting only as receiver and not in its corporate capacity), it is helpful in

determining the scope of the *D'Oench* rule. It has been held consistently that Sec. 1823(e) is a codification of the *D'Oench* doctrine. *Murray, supra* at 1254; *Taylor Trust v. Security Trust Federal Savinqs & Loan,* 844 F.2d 337, 342 (6th Cir. 1988). Furthermore, the *D'Oench* doctrine "has been extended considerably by the courts in interpreting the plain meaning of 12 U.S.C. Sec. 1823(e)," *In re the Matter of CTS Truss, Inc.,* 859 F.2d 357, 362 (5th Cir. 1988), and *D'Oench* has been used to interpret and apply the statute. Langley, *supra* at 401-402. With these considerations in mind, Petitioners will proceed with the argument.

The effect of the statute is limited to agreements concerning specific assets. The statute begins by saying, "No agreement which tends to diminish or defeat the right, title or interest of the Corporation in *any asset* acquired by it...." 12 U.S.C. Sec. 1823(e) (emphasis added). Given the emphasized language, the statute seems to indeed support the Fifth Circuit's ruling that *D'Oench* is not limited to specific assets, but another portion of the statute indicates otherwise. Section 1823(e) goes on to say that for an agreement to be valid, it must be in writing, and "(2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, *contemporaneously with the acquisition of the asset by the bank. Id.* (emphasis added). Clearly, the first quote from the statute establishes that it applies to any assets acquired from a bank by the FDIC. However, the emphasized language in the second quote indicates that the statute applies to agreements related to *specific assets*. Why else would the statute say "with the acquisition of *the* asset?"

One may evaluate this argument by examining the results if it is incorrect. Assume that Sec. 1823(e) is not limited to

agreements adversely affecting specific assets. Also assume the following scenario:

1. Bank and Customer reach an agreement.
2. The agreement is that if Customer will immediately undertake an expansion of his business, Bank will provide him with loans to pay the cost of such expansion.
3. The agreement is in writing.
4. The agreement is executed by Customer and the Bank.
5. The agreement was approved by the Bank's board of directors, and such approval is noted in the board's minutes.
6. As soon as it was executed, the agreement was made an official record of the Bank.
7. Customer has no financial obligations owing to the Bank.
8. Customer immediately undertakes expansion of his business by buying additional supplies and inventory and hiring additional employees.
9. Once Customer takes these actions in reliance on the agreement, Bank then informs Customer that it will not provide him any loans.
10. Customer sues for damages caused by the Bank's breach of the agreement.
11. Shortly after the suit is filed, Bank fails and the FDIC acquires its assets through a purchase and assumption transaction.

Under the above scenario, will Customer's cause of action be barred by Sec. 1823(e)? It would seem that the suit would

not be barred. After all, the agreement was in writing, was approved by the Bank's board of directors, and was an official bank record. However, the agreement would be invalid under the statute, and hence the suit would be barred.

The statute plainly says that in order for an agreement to be valid, it must be executed "contemporaneously with the *acquisition* of *the* asset." *Id.* (emphasis added). The Bank did not acquire any asset as a result of the agreement. Furthermore, Customer had no previous loans or obligations with Bank, meaning that the Bank, and hence the FDIC, held no asset which had any connection to the agreement. As a result, Customer could not show that the agreement was executed contemporaneously with the acquisition of an asset.

This fact alone would not bar Customer's suit. The final blow would come from the fact that the agreement was the basis of a claim which could reduce the value of any given asset held by the FDIC. If the suit was allowed, and Customer prevailed, the FDIC would have to pay damages. Such action would reduce the total value of the assets held by the FDIC. Therefore, the agreement could adversely affect *any* asset held by the FDIC, and would be barred.

Suppose that Customer could prove that the agreement was executed contemporaneously with the acquisition of a specific asset. Seemingly, then, the agreement would be valid even though the suit could diminish the value of that asset, for all the requirements of the statute would be satisfied. The FDIC could simply claim that the agreement would not affect that asset but some other asset which was acquired by the Bank well before or after the execution of the agreement. As a result, Customer could not show that the agreement was executed contemporaneously with the acquisition of *the* asset affected by the agreement, meaning

that he could not satisfy the statute, and his suit would be barred.

In other words, in order to prosecute his claim, Customer would have to show that the agreement was executed contemporaneously with the acquisition of *every* asset held by the FDIC. Such a showing would, of couse, be impossible.

The above example shows what can happen if the statute is not limited to agreements which are related to and adversely affect a specific asset. Even if the agreement was in writing, was approved, and was an official record of the bank, the statute can be manipulated to bar the agreement.

If the statute could be manipulated as set out above, so too could the common law. The end result would be that any claim or defense ever raised against the FDIC would be barred (with the possible exception of those based on fraud in the factum as explained in *Langley, supra* at 402).

To further illustrate this point, assume an agreement which does involve a specific asset. Also assume that the agreement solidifies and/or enhances the bank's (and hence the FDIC's) interest in the asset. Under the Fifth Circuit's analysis, any defense or claim based in any way on such agreement would be barred because the litigation could adversely affect *any* asset held by the FDIC. It would not matter if the agreement was in writing and properly approved, executed, and recorded. The fact that the value of the specific asset involved would be enhanced would also be irrelevant.

Such a result is not only harsh and unjust to the "Customer," it does not fulfill any of the policies and objectives of the statute — or *D'Oench*.

The Fifth Circuit's ruling that *D'Oench* is not limited to agreements adversely affecting specific assets greatly

expands *D'Oench* — so much so that even written agreements and agreements which do not diminish the interest of the FDIC in an asset covered by the agreement could be barred. Such expansion of the law is not supported by precedent or principle.

CONCLUSION

The bottom line is that *D'Oench* is limited to agreements adversely affecting specific assets. This conclusion is of utmost importance to this case. The only specific asset of the Bank which was affected by the agreement was Petitioners' outstanding debt to the Bank. The agreement did *not* adversely affect that asset. In fact, the agreement *enhanced* the asset, for it placed in the Bank's control money over which it originally had no control or right, and, furthermore, a significant amount of this money was to be applied to the debt. The agreement ensured that payments would be made on the debt. Given these facts, there is no way the Bank's interest in its asset was diminished. Petitioners argue that since the Bank's interest was not adversely affected, the FDIC's interest in the asset was not adversely affected. Therefore, *D'Oench* is inapplicable.

There is an even more compelling reason why *D'Oench* is inapplicable. The one asset of the Bank affected by the agreement was never acquired by the FDIC. It is a fact that the Bank used all the funds obtained through the agreement to reduce Petitioners' indebtedness as quickly as possible. The FDIC has never once claimed that Petitioners owe any money. One would think that if Petitioners did owe money, the FDIC would have said so. In fact, the FDIC would have a *duty* to say so. This duty would be twofold: 1) in order to fulfill its legal mandate as receiver, the FDIC would be obligated to collect the money owed, and 2) the claim against Petitioners would be a *compulsory* counterclaim under Fed.

R. Civ. P. 13 (a). However, the FDIC has made no such claim. It can be inferred that Petitioners do not owe any money, meaning that there is no asset held by the FDIC which could be linked to the agreement, meaning further that the agreement did not and cannot adversely affect any specific asset acquired from the Bank by the FDIC. Consequently, *D'Oench* is not applicable.

V. *D'OENCH REQUIRES A SHOWING OF FAULT.*

Petitioners' secondary argument in the court below was that *D'Oench* required a showing of some sort of fault. This argument was supported in general by two cases. *Gunter v. Hutcheson,* 674 F.2d 862, 872 (11th Cir. 1982), cert. denied, 103 S. Ct. 60 (1982), stated that *D'Oench* required a showing of fault. Likewise, *FDIC v. Meo,* 505 F.2d 790, 793 (9th Cir. 1974), held that the defendant was "wholly innocent of any wrongdoing or negligence," and therefore *D'Oench* did not bar his defenses.

The Fifth Circuit totally dismissed the argument, and the analysis appears in three paragraphs under headnote 5 at 868 F.2d 753-754.

Before exposing the inherent weaknesses of the lower court's reasoning, Petitioners will establish the foundation of their position. The test for application of *D'Oench* is whether the borrower *lent himself* to a scheme or arrangement likely to mislead the banking authorities. *D'Oench, supra* at 460; *McClanahan, supra* at 715; *Investors Associates X, supra* at 154; *Vestring, supra* at 1273. If an obligor is totally innocent of fault, how has he *lent himself* to a scheme or arrangement? With this paramount question in mind, Petitioners will proceed with their argument.

Petitioners submit that there are several types of fault, all of which are presented below.

Voluntary participation

The following cases establish voluntary participation in a deceptive scheme or arrangement as a type of fault: *Castle, supra* at 1107; *Hatmaker, supra* at 37; *Huston, supra* at 6, 17; *LaFeve, supra* at 769.

Negligence or reckless conduct

McClanahan, supra, provides a prime example of this type of fault. Other examples are *Murray, supra,* and *Powers, supra,* in which the obligors signed documents in blank. *Cardinal Oil, supra,* shows another type of negligence in that the guarantors could have revoked the guaranties at any time but did not do so.

Knowingly contributing to a deceptive scheme

D'Oench gives rise to this type of fault. The obligor knew that the note in question was fraudulent, knew it was being used for a fraudulent purpose, and knowingly renewed the note. *D'Oench, supra* at 454, 459-460. Knowing contribution was also relied upon in *FDIC v. Leach,* 772 F.2d 1262, 1267 (6th Cir. 1985), and *FDIC v. Julius Richman, Inc.,* 80 F.R.D. 114, 117 (E.D.N.Y. 1978).

None of the above types of fault are present in the case at bar. Petitioners' suit is not based on agreements in which Petitioners volutarily took part. The suit is based on the breach of the agreement which went into effect on or about April 1, 1986. Given *Jenkins v. McKeithen, supra,* it is fact that Petitioners were fraudulently induced into taking action, and then the Petitioners were *forced* into accepting the "agreement" *under duress*. None of the types of negligent or reckless behavior discussed above occurred here. The only possible negligence committed by Petitioners could be their failure to discover that the Bank and Jobe were

making fraudulent misrepresentations and had no intention of honoring any agreement. Given Petitioners' previously good seventeen year history with the Bank, it is difficult to find fault with Petitioners in this respect.

The third type of fault is likewise absent. As shown, the agreement in question involved only one asset of the Bank, and that asset was not adversely affected. Therefore, the agreement made no misrepresentations about an asset of the Bank. Also, even if the previous sentence is incorrect, there is no indication that Petitioners knowingly had anything to do with such misrepresentation.

In short, Petitioners argue that 1) a showing of fault is required, 2) case law establishes three types of fault, and 3) none of the types of fault are present. The Fifth Circuit, however, rejected these contentions.

In so doing, the appellate court stated that it is irrelevant that Petitioners were coerced under economic duress to accept the agreement. *Bell & Murphy, supra,* at 754. This conclusion was based on three premises. The court stated in the first that in *D'Oench*,

> the Court there suggested that even a borrower who was "very ignorant and ill-informed of the transaction" and did not "intend to deceive any person" would likewise be precluded from asserting defenses based upon unrecorded side agreements that altered the terms of a facially unqualified note. *Id.* at 753 (quoting *D'Oench*).

Petitioners point out that the case at bar has nothing to do with altering the terms of a facially unqualified note — or any other asset of the Bank. The "very ignorant and ill-informed" language actually came from *Rinaldi v. Young,* 92 F.2d 229, 231 (D.C. Cir. 1937). That case also dealt with altering the terms of an obligation (and avoiding the obliga-

tion), and is likewise inapplicable to the case at bar. The issue of intent will be addressed later.

The appellate court used the inapplicable first premise as a step to the second premise, which states

> Moreover, numerous subsequent decisions have applied the *D'Oench, Duhme* rule in cases where the borrower was innocent of any wrongdoing, holding that the relevant question is not whether the secret agreement was itself fraudulent or whether the borrower intended to deceive banking authorities, but rather whether the borrower "lent himself to a scheme or arrangement" whereby those authorities were likely to be misled. *Id.* at 753-754 (citing *Beighley, supra*).

Petitioners again raise the question "if a borrower is completely innocent of any wrongdoing, how has he lent himself to a deceptive scheme?

The final premise says

> The *D'Oench, Duhme* doctrine thus favors the interests of depositors and creditors of a failed bank, who cannot protect themselves from secret agreements, over the interests of borrowers, who can. *Id.* at 754 (citing *Langley, supra,* and *McClanahan, supra*).

Petitioners do not disagree with the above statement; however, its application as a premise to the Fifth Circuit's conclusion on coercion is dangerous. If a borrower has been coerced into an agreement, how can he protect himself? The appellate court seems to think that he could and should "insist[] that the bank properly record the agreement." *Id.* A person who has been coerced is in no position to *insist* on anything, particularly a specific course of action by the coercing party.

Petitoners argue that if the basis for the ruling is unsound, the ruling itself is unsound. In any event, a close examination of the ruling itself shows its weakness. The ruling that coercion is irrelevant is in conflict with *FDIC v. Linn,* 671 F. Supp. 547 (E.D. Ill. 1987), which held that Sec. 1823(e) did not bar proof that a particular note did not reflect a valid agreement because the note was executed under economic duress. Given the relation between the statute and the common law, how can the defense of economic duress be allowed under one and not the other? Furthermore, examine this issue from a common sense point of view. If one is forced into an agreement, how did that person *lend* himself to the agreement? Petitioners urge that the answer is "he did not lend himself to the arrangement." In short, Petitioners argue that the appellate court's ruling on coercion and duress is ill-founded, in conflict with other precedent, and unsupported by precedent.

Now that Petitioners have critically analyzed the lower court's opinion, they must state that the opinion is correct on the issue of intent. However, such concession does not alter the fault argument, for it does not mean that a showing of fault is unnecessary. Intent has nothing to do with negligence, nor does it alter the fact that a person could intend not to deceive but nonetheless voluntarily enter into a precluded agreement. In other words, intent is not relevant in determining fault. The same reasoning applies to a person's knowledge (or lack thereof).

None of the authorities discussed herein say that *D'Oench* does not require a showing of fault. At most they say that such fault does not have to rise to the level of blatant illegality (such as intending to deceive or knowing an arrangement is fraudulent or deceptive).

Petitioners are unaware of any authorities stating that a showing of fault is not required. *Powers, supra,* does say that "*D'Oench* has been applied to bar defenses apparently not attributable to the conduct of the Defendants." *Id.* at 1171, citing only *Gunter, supra*.

A close examination of *Gunter* shows that the above statement from Powers is incorrect. *Gunter* was in no way based on *D'Oench*. There was no oral side agreement involved; hence, Sec. 1823(e) was inapplicable. *Id.* at 867. Since Sec. 1823(e) is a codification of *D'Oench*, it follows that *D'Oench* was also inapplicable. *Gunter* was decided on the basis of federal common law, but it was law newly created pursuant to *United States v. Kimbell Foods, Inc.,* 440 U.S. 715 (1979). *Gunter, supra* at 868-873. *Gunter,* therefore, does not support the above statement from *Powers.*

CONCLUSION

In conclusion, Petitioners argue that *D'Oench* requires a showing of fault, and the Fifth Circuit's reasoning and conclusions on the issue are incorrect. This conclusion is very significant, for Petitioners did not commit any fault, meaning that *D'Oench* is inapplicable.

VI. *THE ISSUE OF FRAUD IN THE INDUCEMENT*

The appellate court did not address the issue of fraudulent inducement, but Petitioners feel compelled to do so. Many cases hold that fraud in the inducement does not take an agreement out of the purview of *D'Oench* or Sec. 1823(e). Eight of the cases summarized earlier made such rulings. In four of those cases, the agreements sought to alter the written terms of an obligation. *Langley, supra; Investors Associates X, supra; Cardinal Oil, supra; Vestring, supra.* The other four cases involved agreements that were voluntarily entered into. *Castle, supra; Hatmaker, supra; Huston, supra;*

LaFeve, supra. All of the cases, then, contained allegations of fraud in the inducement *plus* some other factor. Neither of those factors are present in the case at bar. There has been no attempt to alter the terms of any obligation, and Petitioners did not voluntarily enter into the agreement. Therefore, Petitioners argue that their claims should not be dismissed only on the basis that they include allegations of fraudulent misrepresentation.

VII. *AGREEMENT NOT BARRED DUE TO BILATERAL OBLIGATIONS.*

The agreement in question established bilateral obligations between Petitioners and the Bank; therefore, the agreement is not barred. *Howell v. Continental Credit Corp.*, 655 F.2d 743, 746 (7th Cir. 1981). The appellate court dismissed this argument because the "alleged bilateral agreement...is unrecorded." *Bell & Murphy, supra,* at 754. There has been no evidence presented which shows directly or indirectly that the agreement was not recorded. On the other hand, it must be accepted as fact that the agreement was in writing and was written by the Bank president, Jobe. These facts indicate that the agreement was recorded. They certainly do not support the "finding" that the agreement was not recorded. Therefore, since the agreement was in writing and did establish bilateral obligations, *Howell, supra,* is applicable to this case.

PRAYER

Based on the preceding argument, Petitioners pray that this Court grant this Petition for Writ of Certiorari and resolve the issues presented herein. Petitioners further pray that this Court reverse the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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BELL & MURPHY AND ASSOCIATES, INC., John W. Bell, Jr., Harold D. Barnett, Robert D. Hamer, Jr., and Richard L. Mears,
Plaintiffs-Appellants,

v.

INTERFIRST BANK GATEWAY, N.A., and Charles E. Jobe,
Defendants-Appellees.

No. 89-1719
Summary Calendar.

Unites States Court of Appeals, Fifth Circuit

Feb. 21, 1990.

Bank's customer brought action against bank based upon letter agreement pursuant to which bank was to extend open credit loans and honor certain checking account overdrafts in exchange for customer's surrender of its accounts receivable and funds from its pension and profit sharing plan to bank. The Federal Deposit Insurance Corporation (FDIC), intervening as receiver for insolvent bank, removed case to federal court. The United States District Court for the Northern District of Texas, at Fort Worth, Eldon B. Mahon, J., dismissed claims as barred by doctrine of *D'Oench, Duhme,* and appeal was taken. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) unrecorded letter agreement was not enforceable against FDIC, and (2) *D'Oench, Duhme* rule applied to "bridge bank" authorized by FDIC to acquire assets and liabilities of failed bank.

Affirmed.

1. Federal Courts — 797

When reviewing dismissal of claim for failure to state claim, Court of Appeals, like district court, must accept material allegations of complaint as true and construe them

in light most favorable to nonmoving party. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

2. Banks and Banking — 505

Although Federal Deposit Insurance Corporation (FDIC) when acting in its receiver capacity cannot rely upon statutory protection given FDIC in its corporate capacity, FDIC in its receiver capacity is entitled to protection of common law *D'Oench, Duhme* rule which estops borrower from asserting against FDIC defense based upon secret or unrecorded side agreements that alter terms of facially unqualified obligations. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

3. Banks and Banking — 505

D'Oench, Duhme rule, which precludes borrower from asserting against Federal Deposit Insurance Corporation (FDIC) defenses that are based upon secret or unrecorded side agreements that alter terms of facially unqualified obligations, bars not only claims or defenses based upon agreements that defeat FDIC's interests in specific asset acquired by bank, but also, affirmative claims based upon unrecorded agreements to extend future loans.

4. Banks and Banking — 505

Agreement under which customer was to surrender its accounts receivable and funds from its pension and profit sharing plans to bank, in return for which bank was to extend open corporate loans and to honor certain checking account overdrafts, thereby enabling customer to stay in business, was unenforceable under *D'Oench, Duhme* doctrine against Federal Deposit Insurance Corporation (FDIC) acting in its receiver capacity, where agreement was embodied in letter which was not contained in bank's records.

5. Banks and Banking — 505

D'Oench, Duhme doctrine which prohibits enforcement of side agreements against Federal Deposit Insurance Corporation (FDIC) applies not only to claims or defenses

based upon illegal side agreements entered into for purposes of deceiving bank authorities, but also to borrowers who are innocent of any wrongdoing.

6. Banks and Banking — 505

Exception to *D'Oench, Duhme* doctrine, for bilateral agreements made by failed banks was inapplicable to letter agreement entered into by bank's customer and bank, where alleged bilateral agreement which customer sought to enforce against Federal Deposit Insurance Corporation (FDIC) in its receiver capacity was unrecorded.

7. Banks and Banking — 505

D'Oench, Duhme rule, which precludes asserting against Federal Deposit Insurance Corporation (FDIC) defenses based upon secret or unrecorded side agreements that alter terms of facially unqualified obligations, extends to bridge bank authorized by FDIC to acquire assets and liabilities of failed bank.

Joseph E. Ashmore, Jr., Gregory Shamoun, Vassallo & Ashmore, Dallas, Tex., for plaintiffs-appellants.

Bruce L. Collins, William Frank Carroll, John Mitchell Nevins, Baker, Mills & Last, Dallas, Tex., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before WILLIAMS, SMITH and DUHE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Bell & Murphy and Associates, Inc., and four of its employees (collectively, "Bell & Murphy") filed suit in Texas state court against First RepublicBank Dallas, N.A. ("Republic"), and Republic officer Charles E. Jobe, seeking monetary damages for alleged fraudulent misrepresentations by the bank. The Federal Deposit Insurance Corporation ("FDIC") intervened as receiver for the insolvent

Republic, removed the case to federal district court, and then successfully moved to dismiss Bell & Murphy's claims as barred by the doctrine of *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed 956 (1942). We affirm.

I.

[1] Like many companies in the oil and gas industry, Bell & Murphy fell upon hard times in 1985.[1] Severe "cash flow" difficulties prompted the company to seek assistance from Republic, its longtime bank, and to agree to an arrangement suggested by bank officer, Charles E. Jobe. Under the terms of that agreement, Bell & Murphy was to surrender its accounts receivable and funds from its pension and profit sharing plans to the bank; in return, the bank was to extend open corporate loans and to honor certain checking account overdrafts, thereby enabling Bell & Murphy to stay in business. This agreement was embodied in a letter from Jobe to Bell & Murphy, but it was not reflected in Republic's records.

In April 1988, Bell & Murphy filed suit against Republic[2] in Texas state court, alleging that the bank had induced it to enter the agreement through fraudulent misrepresentations and then had breached its obligations under the agreement. Republic was declared insolvent in July 1988, and the FDIC was appointed as receiver pursuant to 12 U.S.C. § 1821(c). NCNB Texas National Bank, N.A. ("NCNB"), was then named by the FDIC to act as the "bridge bank" to acquire a portion of the assets and liabilities of the failed Republic.[3]

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[1] We state the facts as alleged in Bell & Murphy's complaint. This is appropriate, because when reviewing a Fed.R.Civ.P. 12(b)(6) dismissal we, like the district court, must accept the material allegations of the complaint as true and construe them in the light most favorable to the non-moving party. *See, e.g., Reid v. Hughes,* 578 F.2d 634, 637 (5th Cir. 1978).

[2] Jobe also was named as a defendant, but Bell & Murphy does not appeal the judgment in his favor.

[3] *See* 12 U.S.C. § 1821(n), authorizing the FDIC's use of bridge banks to acquire the assets and liabilities and to continue the normal banking operations of insolvent banks.

The FDIC then intervened in this action and removed it to federal district court, basing jurisdiction upon 12 U.S.C. § 1819. After considering extensive briefing by both sides, the district court concluded that even if Bell & Murphy's allegations were true, its claims were barred as to the FDIC and NCNB by the *D'Oench, Duhme* doctrine. The court therefore granted the defendants' motion to dismiss.

II.

A.

We begin our review of the judgment below with a brief discussion of the history and purposes of the *D'Oench, Duhme* rule. In *D'Oench, Duhme,* the defendant executed a note in favor of a bank in order to deceive state regulators by falsely inflating the value of the bank's assets. The defendant and the bank had agreed that the note would no be called for payment, but, for obvious reasons, this agreement was not reflected in the bank's records. Some years later, the bank obtained a loan from the FDIC, which took a security interest in the defendant's note. When the bank failed and the FDIC sued to collect on the note, the defendant raised the side agreement and also asserted that the note was invalid because it had been given without consideration.

The Supreme Court examined the statutory scheme that created the FDIC and concluded that it evidenced a "federal policy to protect ... [the FDIC] and the public funds which it administers, against misrepresentations as to ... the assets in the portfolios of the banks which ... [the FDIC] insures or to which it makes loans." *D'Oench, Duhme,* 315 U.S. at 457, 62 S.Ct. at 679. In order to effect this federal policy, the Court fashioned a common law rule of estoppel precluding a borrower from asserting against the FDIC defenses based upon secret or unrecorded "side agreements" that altered the terms of facially unqualified obligations.

[2] Congress later ratified the result in *D'Oench, Duhme* by enacting 12 U.S.C. § 1823(e), which affords the FDIC,

when acting in its corporate capacity, comprehensive protection against any

> . . . agreement which tends to diminish or defeat . . . [its] interest . . . in any asset acquired by it . . . unless such agreement (1) is in writing, (2) was executed by the depository institution and . . . the obligor, contemporaneously with the acquisition of the asset by the depository institution, (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) has been continuously, from the time of its execution, an official record of the depository institution.

Although the FDIC may not rely upon the enumerated requirements of section 1823(e) where, as here, it acts as receiver rather than in its corporate capacity, *see FDIC v. McClanahan,* 795 F.2d 512, 516 (5th Cir. 1986), it is nonetheless entitled to the protection of the common law *D'Oench, Duhme* rule. *See Beighley v. FDIC,* 868 F.2d 776, 783 (5th Cir. 1989). With this background in mind, we now examine each of Bell & Murphy's efforts to take its claims outside the scope of the *D'Oench, Duhme* doctrine.

B.

[3] Bell & Murphy first advances the argument that the *D'Oench, Duhme* rule bars only claims or defenses based upon unrecorded side agreements that defeat the FDIC's interest in a *specific asset* acquired from a bank. According to Bell & Murphy, the side agreement at issue here, while affecting Republic's total worth, does not diminish the value of Bell & Murphy's admitted outstanding debt to Republic. The side agreement thus could not have misled the FDIC regarding the value of Republic's assets, and *D'Oench, Duhme* does not preclude Bell & Murphy from asserting that side agreement against the FDIC.

[4] We find this inventive argument to be meritless in light of our recent holding in *Beighley* that the *D'Oench, Duhme* rule bars affirmative claims based upon unrecorded

agreements to extend future loans. There, we noted that the "alleged oral agreement to finance future loans . . . [was] not clearly evidenced in the bank's records, and would not . . . [have been] apparent to bank examiners." 868 F.2d at 784. Although the agreement that Bell & Murphy seeks to enforce against the FDIC allegedly is embodied in a letter, it was not contained in Republic's records. Thus, it could not have been discovered by bank examiners and is not enforceable against the FDIC.

[5] We can dispense easily with Bell & Murphy's contention that the *D'Oench, Duhme* rule bars only claims or defenses based upon *illegal* side agreements entered into for the purpose of deceiving banking authorities. Although the obligor in *D'Oench, Duhme* was in fact a knowing participant in such a fraudulent scheme, the Court there suggested that even a borrower who was "very ignorant and ill-informed of the transaction" and did not "intend[ ] to deceive any person" would likewise be precluded from asserting defenses based upon unrecorded side agreements that altered the terms of a facially unqualified note. *D'Oench, Duhme,* 315 U.S. at 458-59, 62 S.Ct. at 679-80.

Moreover, courts in numerous subsequent decisions have applied the *D'Oench, Duhme* rule in cases in which the borrower was innocent of any wrongdoing, holding that the relevant question is not whether the secret agreement was itself fraudulent or whether the borrower intended to deceive banking authorities, but rather whether the borrower "lent himself to a scheme or arrangement" whereby those authorities were likely to be misled. E.g., *Beighley,* 868 F.2d at 784 (quoting *D'Oench, Duhme,* 315 U.S. at 460, 62 S.Ct. at 681). The *D'Oench, Duhme* doctrine thus favors the interests of depositors and creditors of a failed bank, who cannot protect themselves from secret agreements, over the interests of borrowers, who can. *See Langley v. FDIC,* 484 U.S. 86, 94, 108 S.Ct. 396, 402, 98 L.Ed.2d 340 (1987); *McClanahan,* 795 F.2d at 916.

Hence, it is irrelevant to the applicability of the *D'Oench, Duhme* rule whether Bell & Murphy acted in good faith and

even whether Bell & Murphy was "coerced," under "economic duress," into accepting the terms of the agreement proposed by Republic. Bell & Murphy could have protected itself by insisting that the bank properly record the agreement; because it did not, it is estopped from asserting any claims arising out of the bank's alleged secret promise to make future loans.

[6] Relying heavily upon *Howell v. Continental Credit Corp.,* 655 F.2d 743 (7th Cir. 1981),[4] Bell & Murphy next contends that the *D'Oench, Duhme* doctrine does not bar its claims because they are based upon the breach of an agreement that imposes obligations upon *both* parties. While *Howell* indeed does contain somewhat expansive language to the effect that the FDIC is bound by bilateral agreements made by failed banks, a close reading of that decision reveals that the bilateral obligations at issue there appeared on the face of the written, properly recorded agreement which the FDIC sought to enforce.

In *Howell,* a bank promised to purchase certain equipment which it would then lease to Howell. The various leases, which were contained in the bank's records, clearly manifested the bank's obligation to obtain title to the equipment. When the FDIC sued Howell to collect payments due under the leases, Howell sought to defend on the ground that the bank in fact had never obtained title to the equipment and that she had never leased it. The court concluded that Howell should be allowed to present this defense, finding *D'Oench, Duhme* inapplicable where "the document the FDIC seeks to enforce is one, such as the leases here, which *facially manifests* bilateral obligations and serves as the basis of the leasee's defense." *Howell,* 655 F.2d at 746 (emphasis added). *See also FDIC v. O'Neil,* 809 F.2d 350, 354 (7th Cir. 1987) (noting that the dispositive fact in *Howell* was that "[t]he conditions that Mrs. Howell sought to enforce against the FDIC's asset . . . appeared in the asset itself . . .").

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[4] *Howell* was cited approvingly by this circuit in *McClanahan,* 795 F.2d at 515.

Here, the alleged bilateral agreement which Bell & Murphy seeks to enforce against the FDIC is unrecorded. Therefore, the narrow exception recognized in *Howell* does not take Bell & Murphy's claims outside the scope of *D'Oench, Duhme.*

[7] Finally, Bell & Murphy asserts that *D'Oench, Duhme* protections, even if applicable, do not bar a recovery against NCNB, the bridge bank authorized by the FDIC to acquire the assets and liabilities of the failed Republic. However, we agree with the FDIC that failure to extend *D'Oench, Duhme's* protection to bridge banks would undermine the effectiveness of bridge banks as a means of continuing the normal banking operations, and thereby protecting the depositors and creditors, of a failed bank. Moreover, our holding in *FSLIC v. Murray,* 853 F.2d 1251, 1256 (5th Cir. 1988), that the *D'Oench, Duhme* rule provides holder-in-due-course status to the FDIC compels the conclusion that assignees of the FDIC also enjoy protection from claims or defenses based upon unrecorded side agreements.[5] Accordingly, we hold that claims barred as to the FDIC by the *D'Oench, Duhme,* doctrine likewise are barred as to bridge banks authorized by the FDIC to take over the operations of a failed bank.

In sum, we agree with the district court that even if Bell & Murphy's allegations are true, they do not state a claim upon which relief can be granted against either the FDIC or NCNB. Accordingly, the judgment of the district court dismissing Bell & Murphy's claims pursuant to Rule 12(b)(6) is AFFIRMED.

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[5] *See also FDIC v. Newhart,* 713 F.Supp. 320, 324 (W.D.Mo.1989) (subsequent holder of note acquired from FDIC also acquires FDIC's holder-in-due-course status); *RSR Properties, Inc. v. FDIC,* 706 F.Supp. 524, 531 (W.D.Tex.1989) (claims barred as to FDIC are equally barred as to bridge bank NCNB because of FDIC's holder-in-due-course status).

U.S. COURT OF APPEALS
FILED
FEB 21, 1990
GILBERT F. GANUCHEAU,
CLERK

United States Court of Appeals
FOR THE FIFTH CIRCUIT

NO. 89-1719
Summary Calendar

D.C. Docket No. CA4-88-553-E

BELL & MURPHY AND ASSOCIATES, INC., ET AL.,
Plaintiffs-Appellants,
versus
INTERFIRST BANK GATEWAY, N.A. and
CHARLES E. JOBE,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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Before WILLIAMS, SMITH and DUHE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

February 21, 1990

ISSUED AS MANDATE: MAR 15 1990

FILED
TARRANT COUNTY, TEXAS
'88 APR 25 P3:42
THOMAS P. HUGHES
DISTRICT CLERK

NO. 352-112460

IN THE 352 JUDICIAL DISTRICT COURT OF TARRANT COUNTY, TEXAS

BELL & MURPHY AND ASSOCIATES, INC.,
JOHN W. BELL, JR., HAROLD D. BARNETT,
ROBERT D. HAMER, JR., and RICHARD L. MEARS
Plaintiffs,

vs

INTERFIRST BANK GATEWAY, N.A.
and CHARLES E. JOBE,
Defendants.

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, BELL & MURPHY and ASSOCIATES, INC., ("BMA") JOHN W. BELL, JR., HAROLD D. BARNETT, ROBERT D. HAMER, JR. and RICHARD L. MEARS, Plaintiffs, complain of Defendants, INTERFIRST BANK GATEWAY, N.A. ("INTERFIRST") and CHARLES E. JOBE and respectfully show the Court the following:

I.
PARTIES

1. Plaintiff Bell & Murphy and Associates, Inc. is a Texas Corporation, duly formed and existing under the laws of the State of Texas and has its principal place of business in Dallas, Dallas County, Texas.

2. Plaintiffs John W. Bell, Jr. and Robert W. Hamer, Jr. are residents of Dallas, Dallas County, Texas.

3. Plaintiff Harold D. Barnett is a resident of Denton, Denton County, Texas.

4. Plaintiff Richard L. Mears is a resident of Midland, Texas.

5. Defendant Interfirst Bank Gateway, N.A., is a corporation having its principal office in Tarrant County, Texas. Defendant Interfirst may be served with citation by delivery of citation to its president, Charles E. Jobe at 3532 Joyce, Fort Worth, Texas 76116.

6. Defendant Charles E. Jobe is an individual resident of Fort Worth, Tarrant County, Texas and may be served with process by mailing a true copy of the citation with a copy of Plaintiff's Petition attached thereto, by certified mail, delivery restricted to addressee only, return receipt requested, to Jobe's place of business located at Interfirst Bank Gateway, N.A., 3532 Joyce, Fort Worth, Texas 76116.

II.
JURISDICTION AND VENUE

7. Venue is proper in Tarrant County, Texas pursuant to Section 15.001, Texas Civil Practice and Remedies Code. This is an action for fraud with the subject matter of this action having occurred in Fort Worth, Tarrant County, Texas.

III.
BACKGROUND

8. All Plaintiffs have joined in this action due to the fact that the cause of action asserted herein arises out of a transaction common to all Plaintiffs. Consequently, this action can be said to involve the same questions of law and the same questions of fact with respect to each Plaintiff's claim against Defendants.

9. Plaintiffs in this action are comprised of former officers and former employees of BMA.

10. BMA's primary business objectives involved consultation, interpretation of seismic data and exploration for potential oil and gas reservoirs.

11. Due to the general nature of the Texas ecomony and the nature of the oil and gas industry as a whole, BMA's financial condition in 1985 was deteriorating. In 1985 BMA began experiencing cash flow problems as well.

12. As a result of a seventeen (17) year history at InterFirst, BMA established a quality reputation. As a result, BMA's cash flow problems were countered by Defendants in 1985.

13. In 1985, Defendants verbally agreed to honor all payroll tax checks that resulted in an overdraft on BMA's checking account.

14. By April of 1986, Defendants effectively controlled the corporate operations of BMA, and at this point Defendants arbitrarily honored certain checks while not honoring other checks issued by BMA.

15. Specifically, Defendants no longer honored checks written by BMA to the Internal Revenue Service expressly for payroll tax purposes. Defendants had knowledge that said checks were for payroll taxes as they were duly labeled and presented, by BMA, to Defendants. Defendant, in violation of the verbal agreement, did not cover BMA checks for payroll taxes in the second, third and fourth quarter of 1985 and the first quarter of 1986.

16. As a result of BMA's continuing financial problems, Defendants began demanding that BMA to obtain corporate loans from BMA's pension plan and profit sharing plan.

17. BMA, desiring to continue its relations with Defendant on the best possible level, attempted to obtain loans from its profit sharing plan and its pension plan. It was determined that BMA would have to follow a procedure, as per Employee Retirement Income Security Act, which would require a minimum of six to nine months before the loans could be obtained.

18. Defendants, at that time, were unwilling to wait six months and told BMA to find a way to get a loan from these plans. BMA determined that its employees could borrow from these plans on an individual basis whereupon each individual would loan these monies to BMA.

19. Defendants demanded BMA obtain these loans. In January 1986, Jobe wrote an offer stating "an investment from BMA was now required to keep it in operation". This offer was presented to the employees of BMA. The offer provided for the funds from the pension plan to be used to cancel a portion of the debt held by Defendants. The funds from the profit sharing plan were to be used to extinguish a debt held by the Internal Revenue Service.

20. The letter agreement by Defendants was a fraudulent inducement to the employees of BMA. The bank used the letter to fraudulently gain control of the assets beyond the bank's control.

21. Once this proposed offer was accepted by BMA and its employees and once the process of obtaining these loans was well on its way to completion, Defendant notified BMA that its original plan was not sufficient. At this point, Defendants demanded that the loans from each plan be lumped together whereupon a two-thirds share of all monies was to be taken by Defendant and one-third was to be given to the Internal Revenue Service. BMA, as a result of its economic position, had no viable alternatives when Defendant, contrary to its original offer which had been accepted by Plaintiffs, shifted its position. This shift in position by the bank caused Plaintiffs to accept Defendants offer under economic duress.

22. The Contract structured according to Jobe's whim fell into place on or about April 1, 1986. This Contract called for BMA's account receivables to be paid to Defendants, it called for the employees individual loans to the corporation to be paid two-thirds to the Defendant and one-third to the Internal Revenue Service; it called for BMA to change its pay period to semi-monthly; it called for BMA to reduce the salaries of its senior executives to a level that only met

minimum living obligations and the agreement called for BMA to reduce the pay to other employees and officers of BMA by fifteen percent.

23. All of the conditions imposed by Defendants upon BMA were met. The agreement, in effect, was designed to allow BMA to continue to operate while Defendants were to loan money to BMA for any overdrafts, including payroll checks, checks to the Internal Revenue Service for payment of withholding taxes and other checks for necessary operating expenses.

24. Defendants during the operation of the agreement were continually recovering monies from BMA's accounts receivables. At least one million dollars in consulting fees were being billed on an annual basis and at no time did the overdraft account exceed the total amount owed to BMA.

IV.
CAUSE OF ACTION

25. As a result of BMA's total compliance with every obligation of the letter agreement imposed by Defendants, BMA was to have been able to operate without limitation. In other words, Defendant was obligated to "work" with the corporation and was to extend open corporate loans so long as BMA complied with the terms of the agreement.

26. Defendants InterFirst and Jobe, upon extending the offer to BMA, knew that BMA was on the verge of financial ruin. Defendants also knew that it stood to lose money if BMA failed prior to obtaining loans from its profit sharing plan and pension plan.

27. As a result of this knowledge, Defendants knowingly made false representations of material facts to BMA. Said misrepresentations were made with the intent to induce Plaintiffs to obtain loans from their profit sharing and pension plans so that Defendant could reduce the outstanding balance owed by BMA.

28. Plaintiffs submit the above representations concerned material facts for the reason that Plaintiffs would not have pursued and obtained loans from either the profit sharing plan or the pension plan had Defendant's intent (to reduce the sum owed by BMA as quickly as possible without regard to whether BMA survived the economic crisis it was experiencing) been known by Plaintiffs. The above representations of Defendant were relied on by Plaintiffs to their substantial injury and damage.

V.
DAMAGES

29. By reason of Plaintiffs' reliance upon Defendants' misrepresentations described above, Plaintiffs have been damaged in an amount in excess of the minimum jurisdictional limits of the Courts.

30. Plaintiffs further allege that by reason of the fact that Defendants knew that the representations were false at the time they were made, said representations were willful and malicious and constitute conduct for which the law allows the imposition of exemplary damages. In this connection Plaintiffs will show that they have incurred significant expenses, including attorney's fees, in the investigation and prosecution of this action. Accordingly, Plaintiffs request that exemplary damages be awarded against the Defendant in a sum which exceeds the minimum jurisdictional limits of the Court.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant be cited to appear and answer and that on final trial, Plaintiff have:

1. Judgment against Defendants for actual damages in a sum in excess of the minimum jurisdictional limits of the Court, with interest at the lawful rate from April 1, 1988 until Judgment;

2. Judgment against Defendants for exemplary damages in a sum to be determined by the trier of fact;

3. Interest after Judgment at the rate of 10 percent per annum until paid;

3. Costs of suit; and

5. Such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,
VASSALLO & ASHMORE, P.C.

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U.S. DISTRICT COURT
NORTHERN DISTRICT
OF TEXAS
FILED
AUG 22, 1988
NANCY DOHERTY, CLERK
By ________ CF________
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS WICHITA FALLS DIVISION

CIVIL ACTION NO. CA 7-87-62

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for
FIRST NATIONAL BANK OF OLNEY, OLNEY TEXAS
and in its Corporate Capacity,

versus

REX M. HUSTON.

ORDER

Before the Court is Plaintiff's Motion for Summary Judgment. Plaintiff, the Federal Deposit Insurance Corporation (FDIC), contends that it is entitled to judgment as a matter of law on the notes and guaranties it holds. Plaintiff contends that the notes are due and payable and Defendant's asserted defenses are invalid as a matter of law under section 1923(e) of Title 12, United States Code and the federal common law.

Defendant Rex Huston contends that Plaintiff is not entitled to judgment as a matter of law because his defenses and counterclaim are not precluded by section 1823(e) or the federal common law. Defendant has asserted the defenses of usury, fraudulent misrepresentation and lack of consideration. He has also counterclaimed against the FDIC in its receivership capacity and corporate capacity for usurious interest.

The following facts are undisputed for purposes of this motion for Summary Judgment:

1. In 1982, Defendant approached First National Bank of Olney (the Bank) for a loan. Mr. Conley, vice-president of the Bank informed him that he would not receive the loan unless he signed certain guaranties.

2. The guaranties were on loans to acquaintances of Defendant, Tommy Ballard, and Barbara Robinson, for a total sum of $59,250.00, which were due and owing at that time.

3. Mr. Conley represented to Defendant that the guaranties would never be used, they were only needed to satisfy the bank examiners.

4. Defendant signed three blank guaranties.

5. Subsequently Defendant received a loan in the amount of $110,000.00 with interest at the rate of 15.5%.

6. Later Defendant received two other loans, one in the amount of $20,000.00, the other for $70,000.00.

7. The Bank instituted suit against Defendant Huston for payment of the notes and guaranties in December, 1984.

8. Defendant responded asserting usury as a counterclaim and defense. Later he amended his pleadings to assert lack of consideration and fraud in the inducement as affirmative defenses.

9. On March 12, 1987 the Bank was declared insolvent.

10. The FDIC in its receivership capacity assumed control of the bank. It then sold all the Huston notes and guaranties to FDIC in its corporate capacity. However the FDIC in its receivership capacity kept the liabilities of the Bank, including the asserted counterclaim pending in the state court suit.

11. The FDIC then intervened in the state court suit and removed the case to federal court.

Upon these facts Plaintiff now moves this Court for Summary Judgment contending that it is entitled to Judgment as a matter of law.

Defendant alleges that he is not liable on the guaranties because the facts, above, establish lack of consideration. The guaranties were on loans that had already been made and which were past due when the guaranties were signed, thus there was no consideration for the signing of the guaranties. Further Defendant alleges that the signature on the guaranties were procured by fraud. Mr. Conley represented to Defendant that the guaranties would not be called in, and relying on such representation, Defendant did sign the guaranties.

Defendant also alleges that since the guaranties were signed as a prerequisite to the approval of his $110,000.00 loan then such amount due on the guaranties are in the nature of interest on that loan. Defendant contends that the interest on the face of the note and the amount of the guaranties together constitute usurious interest on the $110,000.00 note.

The parties have agreed to an analytical framework encompassing two distinct elements of the lawsuit. These are: (A) FDIC's claim for affirmative relief on the guaranties and notes brought in its corporate capacity and (B) Huston's claim for affirmative relief for usury damage brought against FDIC in its receivership and corporate capacities. Accordingly the Court will use this same framework to determine the issues before it.

A. FDIC'S CLAIMS ON THE NOTES AND GUARANTIES:

The FDIC seeks judgment on three notes and three guaranties signed by Defendant Huston. They are:

a. The note for $110,000.00 dated September 22, 1982.[1]

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[1] Plaintiff in its supporting affidavit requests judgment on the entire $110,000.00. However Plaintiff's petition requested relief for $74,722.40 as the remaining unpaid balance on the note. The petition alleges that

b. The note for $70,468.92 dated November 10, 1982.

c. The note for $20,000.00 dated April 28, 1983.

d. Guaranty for a note signed by Tommy Ballard in the amount of $15,000.00 dated September 15, 1982.

e. Guaranty for a note signed by Barbara Robinson in the amount of $25,000.00 dated September 15, 1982.

f. Guaranty for a note signed by Barbara Robinson in the amount of $19,250.00 dated September 15, 1982.

Defendant contends that he is not liable on the $110,000.00 and the guaranties because of usury.[2] Further he alleges that he is not liable on the guaranties because of fraud in the inducement and lack of consideration. Plaintiff alleges that Defendant's defenses and counterclaim are based upon an oral side agreement that "tends to diminish its interest" in the notes and thus the agreement cannot be considered pursuant to 12 U.S.C. section 1823(e).

Section 1823(e) of Title 12, United States Code, states:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors or its loan committee, which approval shall be reflected in the minutes of said

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payment of $64,798.22 was made on the note, the sum of $35,277.50 was applied to the principle and the sum of $29,520.72 was applied to interest. No amended petition seeking the entire amount has been filed. Thus if the Court awards any relief it will be in the amount requested in the petition.

[2] Defendant admits his liability on the other two notes, and offers no defense to them. However Defendant intends to offset these notes by the usury damages he hopes to prove.

> board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

It is undisputed that the alleged arrangement between the bank and Defendant Rex Huston was oral and not part of the bank records. Further none of the documents referred to such an arrangement.

1. Fraud in the inducement:

Defendant argues that accepting the facts as alleged he was fraudulently induced to sign the notes because at the time he did sign the three blank guaranties the vice-president of the bank, Richard Conley, represented to him the guaranties would not be used, that they were protection for the bank and for the regulators. That the guaranties would stay in Mr. Conley's desk and Defendant would not be called on to perform on those guaranties. *See* Deposition of Rex Huston, at 38.

Plaintiff argues that this agreement between the Bank and Defendant is invalid because it clearly violated section 1823(e). The Court agrees.

The purpose of the statute is:

> to protect the FDIC from the hidden agreements that would defeat its interest in what is otherwise a facially valid note. Such hidden agreements would prevent the FDIC from accurately valuing assets and from making informed decisions on how best to handle a bank's insolvency. The concern is thus with agreements that are not made part of the note. *Federal Deposit Insurance Corporation v. Castle.* 781 F.2d 1101, 1107 (5th Cir. 1986) (citations omitted).

Thus "[t]hat such an agreement might have been fraudulently induced is immaterial; what is important is that the borrower voluntarily entered into such a *side* agreement." *Id.* at 1107. There has been no suggestion that the

Defendant did not voluntarily enter the agreement. The deposition testimony reveals that Defendant did sign the guaranties in question after the representation was made to him. *See supra.*

Thus the Court finds that Defendant's asserted defense of fraud in the inducement is invalid as against the FDIC since such defense depends on a side oral agreement that diminishes the interest of the FDIC in the guaranties.[3]

2. Lack of Consideration:

Defendant alleges that he is not liable on the guaranties because there was no consideration for his signature on those guaranties. He alleges that the underlying notes on which the guaranties were given were already due and payable, thus no value was given for the guaranty.

Under Texas law, a valuable consideration for a contract is either benefit to the promisor or detriment to the promisee or a surrender by the promisee of some legal right. *El Paso County Water Imp. Dist. No. 1 v. City of El Paso*, 243 F.2d 927 (5th Cir.) *cert. denied,* 355 U.S. 820 (1957). When two instruments are executed as part of the same transaction, the benefit accruing to one of the parties in one instrument may be consideration for promise of such party in the other. *Mitchell v. Lawson,* 444 S.W.2d 192 (Tex. Civ. App.—San Antonio 1969, no writ).

The acts as alleged by Defendant, and as accepted by Plaintiff for purposes of this motion, reveal that the Defendant did indeed receive consideration. Defendant testified that he signed the guaranties in return for the bank's

[3] The court notes that the FDIC has been allowed to recovery on very similar facts. *Federal Deposit Insurance Corporation v. Powers,* 576 F.Supp. 1167 (N.D. Ill. 1983), *aff'd.* 753 F.2d 1076 (7th Cir. 1984) (cited with approval in *Federal Deposit Insurance Corporation v. Castle.* 781 F.2d 1101, 1107 (5th Cir. 1986). In *Powers* the defendant signed a guaranty in blank but with the understanding that he was not guaranteeing the underlying obligation. The understanding was oral and not part of the loan record. There the Court held that under section 1823(e) the Defendant was estopped from asserting this understanding as a defense to the guaranty.

loan to him of $110,000.00. *See* Deposition of Rex Huston at 32. Thus Defendant has no defense for lack of consideration under his version of the facts.

3. Usury:

Defendant contends that he is not liable on the $110,000.00 and the guaranties because the FDIC is attempting to collect usurious interest. He contends that he signed the guaranties as a precondition to the $110,000.00 note and that under Texas law this rendered the guaranties a form of interest on that note in addition to the interest on the face of the note in the amount of 15.5%. Defendant asserts that the guaranties and the stated interest constitute more than a 100% rate of interest on the note and that such rate is usurious.

Further he maintains that the usury defense is not based upon "an 'agreement' which, in and of itself, tends to diminish the rights of the FDIC in the $110,000.00 note and Guaranties. Huston's defense to the $110,000.00 Note and the Guaranties does not depend upon an agreement that the Guaranties and notes not be enforced in accordance with their terms. Rather, Huston's defense arises by operation of the applicable usury statutes." *Defendant's Brief in Support of Response to Motions for Summary Judgment* at 9-10.

However before the usury statutes can be applied, Defendant must establish the arrangement he and the bank entered into. The application of the statute depends on the arrangement, without this arrangement there would be no usury. Thus the arrangement is being used to diminish the FDIC's interest in the note and guaranties.

For purpose of this Motion for Summary Judgment the FDIC has accepted Defendant's contentions on the guaranties and $110,000.00 note as true. Therefore assuming that the parties did enter into an arrangement whereby Defendant signed three blank guaranties and the Bank, in turn, loaned Defendant $110,000.00, the question as to whether this arrangement was an agreement remains.

The Supreme Court in *Langley v. Federal Deposit Insurance Corporation,* 108 S.Ct. 396. 401 (1987) held that "[a]s used in commercial and contract law, the term 'agreement' often has 'a wider meaning than... promise.'...(citations omitted)." Further the court held that the term "agreement" as used in section 1823(e) should be given the common meaning of such word. " 'Agreement' in section 1823(e) covers more than promises to perform acts in the future, it also covers conditions precedent to the maker's performance." *Id.* at 402. Thus such a condition "is part of the 'agreement' to which the writing, approval and filing requirements of 12 U.S.C. section 1823(e) attach." *Id.* at 403.

Therefore Defendant's own testimony that the signing of the guaranties was a "precondition" to the loan of $110,000.00 defeats his argument that such an arrangement was not an agreement.

Defendant argues that even if it was an agreement it was not the type of agreement contemplated by the statute. However "[t]he language of the statute is all encompassing; any agreement is subject to the statute if it tends to defeat or diminish FDIC's rights in an asset purchased under authority of section 1823." *Federal Deposit Insurance Corporation v. Hoover-Morris Enterprises,* 642 F.2d 785, 787 (5th Cir. 1981). Thus any defense which emanates from a party's secret agreement having the effect of misinforming the FDIC, is barred by the FDIC's statutory protections. *Federal Deposit Insurance Corporation v. Langley,* 792 F.2d 541, 546 (5th Cir. 1986). *aff'd.* 108 S.Ct. 396, (1987).

In *Langley* the defendants wanted to buy farm property on which Planters Bank had several defaulted notes. The Bank provided financing for the purchase of the farm and the defendants in turn signed a promissory note, mortgage, and personal guaranties in favor of Planters Bank. These documents contained unconditional promises to pay.

However the Langleys did not pay and were subsequently sued by the Bank. In response the Langleys filed suit against the bank and other parties alleging that the bank

had made various representations to persuade the Langleys to buy the property and that these representations were not true. The Langleys maintained that these misrepresentations relieved them of their obligation to pay on the note.

It was undisputed that the representations were not contained in any part of the documents on which the Langleys were obligated to pay. During the course of the suit the Bank was declared insolvent and the FDIC intervened in the lawsuit. The FDIC moved for summary judgment. The district court granted the motion, holding that section 1823(e) precluded the Langleys' defense. The Langleys appealed, contending that two representations, involving the acreage of the farm and mineral rights, when considered separately, were outside of section 1823(e) and could be asserted against the FDIC.

The Fifth Circuit affirmed the district court, holding that the attempts by the Langleys to assert the misrepresentations against the FDIC was an attempt to vary the terms of the documents held by the FDIC. The Court noted:

> [i]n the instant case, the Langleys and Planters did enter into a side arrangement which was not disclosed in the loan papers. Moreover the Langleys attempt to rely on various parts of that undisclosed arrangement to vary and add terms to the loan documents they executed. The Langley/Planters' undisclosed side agreement involved not only promises regarding the borrowing of money but also the bank's furnishing the property to be bought with the loan proceeds. As part of this undisclosed arrangements. Planters made certain misrepresentations regarding the loan terms (e.g. nonrecourse nature of the loan) and the property to be purchased (e.g., surface and mineral acreage). Despite the critical importance of these oral warranties, they were not disclosed in the executed loan documents (nor do these documents indicate that Planters was so involved in the land purchase).

> Thus, to allow the Langleys to shift the focus of their defense in the instant case would create an unacceptable "end run around section 1823(e)." *Langley*, 792 F.2d at 546 (citation omitted).

In this case the Defendant, Rex Huston, is also attempting to vary the terms of the written documents. The precondition arrangement is not disclosed in the note or in the guaranties.

Defendant argues however that he is not attempting to enforce any side agreement against the FDIC, the agreement in itself is a defense to the FDIC's claims. Defendant however is asserting the same argument that the Langleys did. The Langleys were not attempting to enforce the arrangement they had with Planters Bank. They were also just trying to assert that the agreement or representations made the note unenforceable against them. Basically both Defendants, Rex Huston and the Langleys, claim that the agreement relieves them of their obligation just by its mere existence and thus is not precluded from being asserted against the FDIC. The Fifth Circuit rejected such an argument and the Supreme Court affirmed.

Thus the Court finds that the arrangement between the Bank and Defendant was an agreement which tends to diminish the rights of the FDIC, the statutory protection applies and Defendant cannot use the agreement against the FDIC.[4]

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[4] The Court notes that at the offset this conclusion seems contradictory to the conclusion contained in Section A, 2. In the instant case the agreement has been turned into a double-edged sword. Defendant cannot use it to establish usury, but the FDIC can use it to establish consideration. However the existence of the agreement is not being disputed, just the assertion of it *against* the FDIC.

B. DEFENDANT'S CLAIMS FOR AFFIRMATIVE RELIEF AGAINST THE FDIC.

Defendant claims that he is entitled to all statutory relief relating to usurious claims, that is, he is entitled to three times the usurious interest charged and attorney's fees. Defendant brings this claim against the FDIC in both capacities.

Defendant claims that the precondition impose by the bank, the signing of the guaranties, on his receipt of a loan, was, under Texas law, interest on the $110,000.00 note. These guaranties plus the interest on the face of the note rendered the interest rate over 100%, a usurious rate.

This Court has already determined that this arrangement was an agreement in violation of section 1823(e). *See* section A.3, *supra.* However this section is not applicable in proceeding where the FDIC is acting in its receivership capacity. *Federal Deposit Insurance Corporation v. McClanahan*, 795 F.2d 512, 514 and 516 (5th Cir. 1986).

But the federal common law as announced in *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447 (1942) is applicable to proceedings in which the FDIC is acting in either or both of its capacities.[5] *D'Oench* has been cited for the proposition that secret agreements cannot be used as a defense to recovery by the FDIC. *McClanahan*, 795 F.2d at 517. In this instance Defendant is using the agreement offensively to diminish the FDIC's recovery on the notes and guaranties. However the use of the secret agreement also violates the principle of *D'Oench, Duhme.*

In *D'Oench, Duhme,* suit was brought by the FDIC to recover payment on certain notes, the Defendant responded alleging that the notes had been given to the bank without consideration. The bank had purchased various bonds from Defendant. Later the bonds defaulted. The bank and Defendant then entered into an agreement whereby certain notes were executed so that the Bank could carry the notes and not show any past due bonds. Defendant

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[5] *See McClanahan*, 795 F.2d at 514, n.1., and at 516 (applying *D'Oench* when the FDIC was suing in its receivership capacity) and *FDIC v. Cardinal Oil Well Servicing Co., Inc.*, 837 F.2d 1369, 1372 (5th Cir. 1988) (*D'Oench* prevented the assertion of the defense of misrepresentation against the FDIC suing in its corporate capacity).

obtained a receipt for the notes which contained the following language: "[T]his note is given with the understanding it will not be called for payment. All interest payments to be repaid."

Subsequently the Bank was declared insolvent and the FDIC acquired the notes and brought suit for payment. The defendant produced the receipt asserting the defense of no consideration for the notes.

The Supreme Court held that the Defendant was estopped from asserting this defense because "an accommodation maker is not allowed that defense as against the receiver of the bank and its creditors, or at times even as against the bank itself, where his act contravenes a general policy to protect the institution of banking from such secret agreements." *D'Oench, Duhme,* 315 U.S. at 458. The Court also held that because of the general policy "the defendant could not rely on his own wrongful act to defeat the obligation of the note as against the receiver of the bank." *Id.* at 457-58.[6]

Thus if Defendant Rex Huston was allowed to assert his side arrangement as a basis for his counterclaim against the FDIC in either or both capacities he would be "rely[ing] on his own wrongful act to defeat the obligation of the note as against the receiver of the bank."[7]

The Texas usury statute, Tex. Rev. Civ. Stat. Ann. art. 5069-1.02 (Vernon 1987), provides that:

> (1) Any person who contracts for, charges or receives interest which greater than the amount authorized by

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[6] The court was applying the general policy embodied in the National Banking Act and as explained in *Detrick v. Greaney,* 309 U.S. 190 (1940).

[7] Defendant would be defeating the obligation since in his own brief he admits that he intends to seek an offset on the notes and guaranties which would effectively eviscerate any recovery the FDIC would have on the notes and guaranties. The Court is aware that the FDIC in its receivership capacity no longer has the notes, however Defendant's claims are aimed against FDIC in its corporate capacity. The FDIC in its receivership capacity is being sued only as stepping stone to obtain relief from the FDIC in its corporate capacity. Further the FDIC in its receivership capacities, according to Defendant no longer has any assets of the bank to pay for any liabilities asserted against it.

> this Subtitle, shall forfeit to the obligor three times the amount of usurious interest contracted for, charged or received,...and reasonable attorney fees fixed by the court...
>
> (2) Any person who contracts for, charges or receives interest which is in excess of double the amount of interest allowed by this Subtitle shall forfeit as an additional penalty, all principal as well as interest and all other charges and shall pay reasonable attorney fees....

Thus if the Defendant is allowed to assert his usury counterclaim and he proves his claim, then the FDIC's recovery on the notes and guaranties would be substantially less.[8]

Plaintiff argues that "the primary rationale supporting *D'Oench* Doctrine is that it allows bank regulatory agencies to rely on the integrity of a bank's books and records." *FDIC's Reply Memorandum of Law,* at 28. *D'Oench, Duhme* applies when the Defendant has "lent himself to a scheme or arrangement whereby the (appropriate) banking authority ...was or was likely to be misled." 315 U.S. at 460 (cited in *McClanahan* 795 F.2d at 517). Thus a defendant is estopped from asserting a secret agreement which alters the bank records because "it (the defendant) was responsible for the creation of the false status of the note in the hands of the bank." 315 U.S. at 461.

This rationale was applied to estop a defendant who was so "responsible" from asserting a counterclaim against the FDIC. *Federal Deposit Ins. Corp. v. Chessen,* No. 83-2476 (D. Kan. Oct. 2, 1986) (LEXIS, Genfed library, Dist. file). In *Chessen* the Defendant had signed two notes in favor of ISSB, a bank in Kansas. The notes were signed with the understanding that the Defendant would not be personally liable for the notes and that the notes would be "rolled-over" for up to three years. The notes had been executed at

[8] Defendant is asserting that under *First Empire Bank v. Federal Deposit Ins. Corp.,* 572 F.2d 1361 (9th Cir.), *cert. denied,* 439 U.S. 919 (1978), he can offset the usurious interest against the FDIC in its corporate capacity.

the urging of a group of individuals that sought additional financing for their real estate business. Defendant used the proceeds from the notes to acquire an interest in two limited partnerships established by that group.

The bank was declared insolvent and the FDIC as receiver became the owner of the bank's assets and liabilities. The FDIC brought suit to collect on the notes executed by Defendant, which were in default. The Defendant asserted various defenses and later sought to add five counterclaims. The court refused to allow him to file the counterclaims, holding that the *D'Oench* rule prohibited a defendant, who had lent himself to a scheme that would tend to mislead the banking authorities, from asserting either affirmative defenses or counterclaim which arise out of the deceptive scheme.

This Court agrees with that rationale. A defendant cannot benefit from his own wrongful actions. Here Defendant Rex Huston agreed to enter into a scheme that could deceive the bank examiners and indeed was intended to so deceive. *See* Deposition of Rex Huston at 34 ("the guarantees would stay blank and that the only reason that he wanted them was for the regulators,....."), and now he requests damages arising from his participation in that scheme.

Therefore the Court finds that under the general policy of protecting the FDIC from secret agreements so that it may rely on bank records in appraising the worth and collectibility of the bank's assets,[9] the Defendant cannot assert his counterclaim for usury against the FDIC in either capacity. Defendant was responsible for the creation of the false status of the note and guaranties in the bank records.[10]

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[9] *See Castle*, 781 F.2d at 1108, n.3 (noting "the import-policy considerations discussed by the *Powers* court").

[10] Defendant does not suggest that he was unaware of the deception and as the Supreme Court noted in *D'Oench*, "[p]lainly one who gives such a note to a bank with agreement that it will not be enforced must be presumming that it will conceal the truth from the vigilant eyes of bank examiners." 315 U.S. at 460.

CONCLUSION:

Plaintiff's Motion is granted in all respects except on the question of damages. Plaintiff shall prepare a proposed judgment based upon the amounts requested in Plaintiff's original petition.

It is SO ORDERED.

Entered this 22nd day of August, 1988.

MARY LOU ROBINSON

MARY LOU ROBINSON

UNITED STATES
DISTRICT JUDGE

(2)

No. 89-1893

In The
Supreme Court of the United States

October Term, 1989

Bell & Murphy and Associates, Inc.,
John W. Bell, Jr.,
Harold D. Barnett, Robert D. Hamer, Jr.,
and Richard L. Mears,

Petitioners,

v.

Federal Deposit Insurance Corporation, as
Receiver of First RepublicBank Dallas, N.A.,
(F/K/A First RepublicBank Gateway, N.A.),
NCNB Texas National Bank, N.A., and
Charles E. Jobe,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' NCNB TEXAS NATIONAL BANK, N.A.'S AND CHARLES E. JOBE'S BRIEF IN OPPOSITION

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and Charles E. Jobe

QUESTION PRESENTED

Whether a writ of certiorari should issue to review the dismissal under *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447 (1942) of Petitioners' claim for relief for fraud based upon a secret, unrecorded side agreement with a failed bank?

LIST OF PARTIES AND AFFILIATED CORPORATIONS

The parties to the proceedings are the Petitioners, Appellants and Plaintiffs below, Bell & Murphy and Associates, Inc., John W. Bell, Jr., Harold D. Barnett, Robert D. Hamer, Jr., and Richard L. Mears.

The Respondents, Appellees and Defendants below, are Federal Deposit Insurance Corporation as Receiver of First RepublicBank Dallas, N.A., and NCNB Texas National Bank, N.A. Petitioners incorrectly list Charles E. Jobe as a Respondent, since Petitioners did not appeal to the Fifth Circuit the District Court's judgment in his favor. *See* Appendix at p. A-118, n. 2. ("Jobe was also named as a defendant, but [Petitioners do] not appeal the judgment in his favor.").

The list of affiliated corporations for First RepublicBank Dallas, N.A. is as follows:

Bank Subsidiaries of First RepublicBank Dallas, N.A. not wholly owned:

InterFirst Leasing Ltd. (London) (indirect subsidiary)
Republic Dallas Limited (U.K.) (indirect subsidiary)
Republic International Finance Limited (Asia) (indirect subsidiary)
Hunter Creek Management, Inc. (indirect subsidiary)

The list of affiliated corporations for NCNB Texas National Bank, N.A. is as follows:

Parent Companies of NCNB Texas National Bank, N.A.:

NCNB Corporation
NCNB Texas Corporation
NCNB Texas Bancorporation

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TABLE OF AUTHORITIES

No. 89-1893

IN THE
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BELL & MURPHY AND ASSOCIATES, INC.,
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AND RICHARD L. MEARS,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS
RECEIVER OF FIRST REPUBLICBANK DALLAS, N.A.,
(F/K/A FIRST REPUBLICBANK GATEWAY, N.A.),
NCNB TEXAS NATIONAL BANK, N.A., AND
CHARLES E. JOBE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' NCNB TEXAS NATIONAL BANK, N.A.'S AND CHARLES E. JOBE'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 868 F.2d 750, and is reprinted in the Appendix hereto. (Appendix at pp. A-114 through A-123).

The memorandum decision of the United States District Court for the Northern District of Texas, Fort Worth Division, (Mahon, J.) has not been reported. The District Court decision is reprinted in the Appendix hereto. (Appendix at pp. A-76 through A-77).

STATUTES INVOLVED

The relevant portions of 12 U.S.C. § 1821(d)(9)(A) (1990), 12 U.S.C. § 1821(n)(4)(I) (1990), 12 U.S.C. § 1823(e) (1988), and 12 U.S.C. § 1823(e) (1990) are reprinted in the Appendix hereto. (Appendix at pp. A-1 through A-2).

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in Lower Courts.

This case was originally filed by BELL & MURPHY AND ASSOCIATES, INC., JOHN W. BELL, JR., HAROLD D. BARNETT, ROBERT D. HAMER, JR., and RICHARD L. MEARS (hereafter collectively referred to as "Petitioners") against FIRST REPUBLICBANK DALLAS, N.A. (f/k/a FIRST REPUBLICBANK GATEWAY, N.A., f/k/a INTERFIRST BANK GATEWAY, N.A.) ("REPUBLIC") and CHARLES E. JOBE ("JOBE") on April 25, 1988 in the 352nd Judicial District, Tarrant County as Cause No. 352-112460-88. REPUBLIC and JOBE filed their answer on May 11, 1988.

On July 29, 1988, the Comptroller of the Currency declared REPUBLIC insolvent pursuant to 12 U.S.C. § 191 (1988). On the same date the FDIC was appointed as Receiver for REPUBLIC pursuant to 12 U.S.C. § 1821(c) (1988). Thereafter, the FEDERAL DEPOSIT INSURANCE CORPORATION in its capacity as Receiver of REPUBLIC ("FDIC") and NCNB TEXAS NATIONAL BANK, N.A. ("NCNB") intervened as party defendants (NCNB is hereafter sometimes referred to as "Respondent NCNB") in the state court proceeding and removed this action to the United States District Court for the Northern District of Texas, Fort Worth Division, pursuant to 12 U.S.C. § 1819 (Fourth) (1988).

FDIC and NCNB[1] filed their Motion to Dismiss and Brief in Support thereof, pursuant to FED. R. CIV. P. 12(b)(6). (Appendix at pp. A-10 through A-43). Petitioners filed their Brief in Response to Motion to Dismiss ("Brief in Response") (Appendix at pp. A-44 through A-54).

After further briefing by both parties[2] the Honorable Eldon B. Mahon, on July 6, 1989, entered an order dismissing the action for failure to state a claim upon which relief may be granted pursuant to the doctrines established by this Court in *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447 (1942) *("D'Oench, Duhme")* and *Langley v. FDIC,* 484 U.S. 86 (1987) *("Langley").* (Appendix at pp. A-76 through A-77).

Petitioners appealed that decision to the United States Court of Appeals for the Fifth Circuit as to FDIC and NCNB only. The Fifth Circuit, on February 21, 1990, affirmed the District Court's judgment. (Appendix at pp. A-114 through A-123).

II. Statement of Facts.

In their Original Petition,[3] Petitioners alleged a claim for relief for fraud based upon a secret, unrecorded side agreement with a failed bank. Petitioners alleged that in 1985 they fell into hard times in their oil and gas business and sought assistance from REPUBLIC. Their cash flow problems were "countered" in 1985 by REPUBLIC entering into an oral,

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[1] JOBE later filed, on February 28, 1989, his Joinder in FDIC's and NCNB's Motion to Dismiss and Brief in Support of Motion to Dismiss.

[2] *See* Appendix at pp. A-55 through A-75.

[3] Solely for the purposes of the Motion to Dismiss, the Fifth Circuit appeal, and this Response, Respondents assume that the allegations of the Original Petition are true. (Appendix at pp. A-3 through A-9).

secret, and unrecorded side agreement with Petitioners to honor certain checking account overdrafts which Petitioners were obligated to repay. By 1986 REPUBLIC allegedly controlled Petitioners' operations and, in violation of the oral, secret, and unrecorded side agreement, honored certain checks while not honoring other checks issued by Petitioners to the Internal Revenue Service ("IRS"). (Original Petition at ¶¶ 11-15; Appendix at p. A-5).

As a result of Petitioners' continuing financial problems, REPUBLIC and JOBE, an officer at REPUBLIC, allegedly proposed in writing another secret, unrecorded side agreement which was not made contemporaneous with, but subsequent to, the outstanding debt owed to REPUBLIC and whereby Petitioners would obtain loans from their pension and profit-sharing plan funds. These monies would then be used to cancel a portion of the outstanding debt owed by Petitioners to REPUBLIC and the IRS. (Original Petition at ¶¶ 16-19; Appendix at pp. A-5 through A-6).

REPUBLIC then allegedly demanded, in contravention of this agreement, that more monies be paid to REPUBLIC and less paid to the IRS. Petitioners asserted that they had no alternative but to comply as a result of their economic situation. (Original Petition at ¶ 21; Appendix at p. A-6).

Petitioners purportedly complied with all of the conditions imposed by REPUBLIC under the secret, unrecorded side agreement which, according to Petitioners, was designed to allow Petitioners to operate without limitation, and under which REPUBLIC was obligated to "work" with Petitioners and extend open corporate loans to Petitioners so long as Petitioners complied with the terms of the secret, unrecorded side agreement by repaying their debt obligations to REPUBLIC. (Original Petition at ¶¶ 23, 25; Appendix at p. A-7). In other words, a new condition was imposed on Petitioners' outstanding debt obligations, whereby Petition-

ers would pay their outstanding debts to REPUBLIC with funds from their pension and profit-sharing plans if REPUBLIC would make future loans to Petitioners. REPUBLIC allegedly breached this secret, unrecorded side agreement by not extending the open corporate loans to Petitioners.

REPUBLIC was further alleged to have "knowingly" made false representations of material facts to Petitioners with the intent to induce Petitioners to obtain loans from their pension and profit-sharing plans in order that REPUBLIC could reduce the outstanding balance owed to it by Petitioners before Petitioners' business failed. Petitioners would not, allegedly, have pursued and obtained loans from either the pension or profit-sharing plans had they known that REPUBLIC's sole intent was to reduce as quickly as possible the debt owed to it by Petitioners. The above representations by REPUBLIC were allegedly relied on by Petitioners to their damage. (Original Petition at ¶¶ 26-28; Appendix at p. A-8).

REASONS WHY THE PETITION SHOULD BE DENIED

I. There Are No Special Or Important Reasons Calling For An Exercise Of This Court's Discretionary Power of Supervision.

Certiorari lies only where there are special and important reasons justifying review by this Court. SUP. CT. R. 10.1. There are none in this case. Petitioners have waived their claims for relief against NCNB and JOBE. *See* Section II and Section III, *infra*, at pp. 6 and 7, respectively. Further, the Fifth Circuit did not decide an important question of federal law which has not been, but should be, settled by this Court. SUP. CT. R. 10.1(c). *See* Section IV, *infra*, at p. 8.[4] Also, there

[4] As demonstrated in Section IV, recent amendments to Title 12 of the United States Code effectively eliminate any precedential

is no conflict among the Circuit Courts of Appeals as to whether *D'Oench, Duhme* bars a cause of action against the FDIC or NCNB which is based upon a secret, unrecorded side agreement. SUP. CT. R. 10.1(a). *See* Section V, *infra,* at p. 10.[5] Additionally, the Fifth Circuit has not so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by the district court. SUP. CT. R. 10.1(a). Finally, the Fifth Circuit did not decide a federal question in conflict with applicable decisions of this Court. SUP. CT. R. 10.1(c). *See* Section VI, *infra*, at p. 15.[6]

II. Petitioners Have Waived Their Claims For Relief Against NCNB and JOBE.

Petitioners do not contest the Fifth Circuit's holding that the *D'Oench, Duhme* doctrine protects bridge banks such as NCNB against claims for relief based upon secret, unrecorded side agreements with a failed bank.[7] Petitioners do not assert anywhere in their Petition that their claims for relief based upon the secret, unrecorded side agreement

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value of this Court's decision, since any future claim analogous to Petitioners' present claim would not satisfy the requirements contained in the recent amendments.

[5] Indeed, Petitioners have failed to cite any decision which conflicts with the Fifth Circuit's decision in this case.

[6] As demonstrated in Section VI, the Fifth Circuit followed both its own well-established precedents and the precedents of this Court in *D'Oench, Duhme* and *Langley*.

[7] *See* Appendix at p. A-123: "[W]e hold that claims barred as to the FDIC by the *D'Oench, Duhme* doctrine likewise are barred as to bridge banks authorized by the FDIC to take over the operations of a failed bank."

were not properly dismissed by the lower courts as to NCNB. Petitioners have therefore waived all claims against NCNB.[8]

Additionally, Petitioners incorrectly list JOBE as a Respondent, since they failed to appeal to the Fifth Circuit the District Court's judgment in his favor.[9] Petitioners have also waived all claims for relief against JOBE.

III. In The Alternative, Three of the Questions Presented By Petitioners Have Been Waived.

Should this Court determine that Petitioners have not waived all claims for relief against NCNB and JOBE, Petitioners have nevertheless waived at least three of their Six Questions for Review as posed in their Petition to support their claim for fraud against FDIC and NCNB based upon a secret, unrecorded side agreement allegedly entered into by the failed REPUBLIC.[10]

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[8] However, should this Court determine otherwise, Respondent NCNB will respond to the Petition as if Petitioners had not waived their claims against Respondent NCNB.

[9] *See* Appendix at p. A-118, n.2: "Jobe was named as a defendant, but [Petitioners do] not appeal the judgment in his favor."

[10] Petitioners' arguments raised for the first time on appeal are: "Question 2. Does the fact that the agreement was in writing in the form of a letter from the Bank take it out of the purview of *D'Oench*?"; "Question 4. Does *D'Oench* require a showing of some sort of fault on the part of the party opposing the FDIC?"; and "Question 6. Does the fact that the agreement established on its face bilateral obligations take it out of the purview of *D'Oench*?" (Petition at p. i). These arguments were not asserted in the District Court below. *See* Appendix at pp. A-44 through A-54 and A-66 through A-75. Consequently, the only three questions that are properly before this Court on certiorari are: "Question 1. Does the common law doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) bar Petitioners' causes of action against the FDIC?"; "Question 3. Is the *D'Oench* doctrine limited

The rule is clear that absent special circumstances, this Court will not consider issues which were not raised in or decided by the lower courts. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below.").

Since Petitioners have not alleged any exceptional circumstances so as to avoid waiver, all arguments made here or in the Fifth Circuit, but not raised by Petitioners in the District Court, have been waived and should not be considered by this Court. *DeShaney v. Winnebago County Dep't of Social Serv.*, __U.S.__, 109 S.Ct. 998, 1003 n.2 (1989) (argument "not pleaded in the complaint" and raised for the first time on appeal will not be considered); *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 34 (1977) (where asserted basis of claim had not been "pleaded, argued, nor briefed" in federal district court, it would not be considered by United States Supreme Court on grant of certiorari); *Lawn v. United States*, 355 U.S. 339, 362 n. 16 (1958) ("Only in exceptional cases will this Court review a question not raised in the court below.").

IV. Amendments to Title 12 of the United States Code Eliminate Any Precedential Value of This Court's Decision.

Effective August 9, 1989, Congress enacted the landmark Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (1989). Various sections of FIRREA amended or supple-

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to agreements which diminish the FDIC's interest in a specific asset acquired from a bank?"; and "Question 5. Are the lower court's rulings on questions 3 and 4 above supported by precedent?". (Petition at p. i).

mented the national banking laws contained in Title 12 of the United States Code by expanding the scope of the FDIC's special defenses and explicitly protecting bridge banks such as NCNB against secret, unrecorded side agreements.

Section 217 of FIRREA amended 12 U.S.C. § 1823(e) (1988) to specifically protect the FDIC in its capacity as Receiver. (Appendix at p. A-1). 12 U.S.C. § 1821(d)(9)(A) (1990) was added to provide that a claim for relief which did not meet the requirements of section 1823(e) could not be asserted against the FDIC as Receiver. (Appendix at p. A-2). Finally, section 214 of FIRREA (now codified at 12 U.S.C. § 1821(n)(4)(I)) provides bridge banks (such as NCNB) protection identical to that afforded to the FDIC by 12 U.S.C. § 1823(e) (1990). (Appendix at p. A-2).

These important amendments enacted by FIRREA undermine Petitioners' claim that policy concerns justify the Court's discretionary intervention in this case. More fundamentally, these subsequent amendments make this case an especially poor vehicle for this Court's analysis of the common law doctrines of *D'Oench, Duhme* and *Langley.*[11]

Because this case centers on the propriety of granting Respondents' FDIC's and NCNB's FED. R. CIV. P. 12(b)(6) Motion to Dismiss, it must be accepted as true that the alleged letter agreement was in writing. However, an analysis of Petitioners' Original Petition demonstrates that the alleged agreement was not executed contemporaneously with the admitted prior debt held by REPUBLIC. (Original Petition at ¶¶ 19, 21, 22, 27, and 28; Appendix at pp. A-3 through A-9). Additionally, there is no claim or allegation that the agree-

[11] As demonstrated *infra* at pp. 23-25, the *D'Oench, Duhme* doctrine has been expanded to protect bridge banks such as NCNB from claims for relief based upon secret, unrecorded side agreements with the failed bank.

ment was approved by REPUBLIC's board of directors or loan committee with the approval reflected in the minutes of such board or committee, nor is there a claim or allegation that the agreement was continuously an official record of REPUBLIC. (Original Petition; Appendix at pp. A-3 through A-9).[12]

Any review by this Court of the common law doctrines established by *D'Oench, Duhme* and *Langley* would have little precedential impact since it is clear that a future claim (against a bridge bank such as NCNB) analogous to Petitioners' present claim would not survive the "bright line" requirements established by FIRREA.[13]

For example, a claim similar to Petitioners asserted in the future against a bridge bank would satisfy only the "in writing" requirement of 12 U.S.C. § 1821(n)(4)(I)(i) (1990). Such future claim, however, would not satisfy: the contemporaneous requirement of 12 U.S.C. § 1821(n)(4)(I)(ii) (1990); the board of directors or loan committee approval as reflected in the minutes of said board or committee requirement of 12 U.S.C. § 1821(n)(4)(I)(iii) (1990); or the continuous official record requirement of 12 U.S.C. § 1821(n)(4)(I)(iv) (1990).

With the enactment of FIRREA the issue presented by Petitioners is of such minor importance in the overall struc-

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[12] Petitioners concede that "[t]hese written agreements might not meet all the requirements of § 1823(e) [(1988)] . . . ." Appendix at p. A-108.

[13] This is not to say that section 1823(e), even as amended, is an all-encompassing codification of the expansive *D'Oench, Duhme* doctrine. In several respects, *D'Oench, Duhme* is broader in application than its statutory cousin. *See People ex rel. Hartigan v. Commercial Mortgage Corp. of Am.*, 723 F.Supp. 1258, 1261 n.4 (N.D. Ill. 1989) ("If anything, the *D'Oench* doctrine sweeps *more* broadly than Section 1823(e).") (emphasis in original).

ture of the law that resolution by this Court is unnecessary. *See Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 75-80 (1955) (certiorari dismissed where issue upon which the controversy rested was directly addressed by recently enacted statute and issue was no longer a live one); *Sokol Bros. Furniture Co. v. Commissioner,* 185 F.2d 222 (5th Cir. 1950), *cert. denied,* 340 U.S. 952 (1951)(certiorari denied on tax issue where issue could no longer arise under subsequent amendment which changed controlling statutory provisions).

V. The Decision Below Does Not Create A Conflict Among The Circuit Courts of Appeals.

Petitioners aver that "[t]he lower court's rulings conflict with rulings from other Circuits regarding the following issues: 1) whether *D'Oench* applies only to agreements adversely affecting the FDIC's interest in specific assets acquired from a bank, and 2) whether *D'Oench* requires a showing of some sort of fault on the part of the party opposing the FDIC." (Petition at p. 4). Petitioners have failed to demonstrate any conflict among the Circuit Courts of Appeals with regard to either of these issues.

With respect to the first supposed conflict, Petitioners have failed to cite *one* conflicting decision from any other Circuit Court of Appeals. (Petition at pp. 12-21). Rather, Petitioners have merely attempted to distinguish and discredit a prior Fifth Circuit decision[14] and to erect several elaborate hypo-

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[14] Petitioners allege that *Beighley v. FDIC,* 868 F.2d 776 (5th Cir. 1989) was "incorrect and cannot serve as authority for the judgment before this Court for review." (Petition at pp. 12-15). Petitioners cite no authority from other Circuit Courts of Appeals which has criticized or questioned the decision in *Beighley.* On the contrary, *Beighley* has been followed by a district court in the Tenth Circuit. *See Castleglen, Inc. v. Commonwealth Sav. Ass'n,* 728 F. Supp. 656, 669 (D. Utah 1989).

thetical scenarios based upon 12 U.S.C. § 1823(e) which have nothing to do with the facts of this case.[15]

Petitioners' attempt to distinguish or discredit prior Fifth Circuit cases and their use of hypothetical scenarios relates to the correctness of the lower court's decision rather than demonstrating a conflict among the Circuit Courts of Appeals.[16] That the Fifth Circuit did not allegedly adhere to its own precedents is not determinative or even probative of this Court's decision to exercise its certiorari jurisdiction. As Justice Rehnquist stated for the Court in *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974), "[t]his Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."

Further, this Court has steadfastly refused to grant certiorari to review a hypothetical situation or to issue advisory opinions. *FCC v. Pacifica Foundation*, 438 U.S. 726, 735 (1978) ("[F]ederal courts have never been empowered to

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[15] For example, Petitioners' request this Court to "assume" several facts not present here, including that: "5. The agreement was approved by the Bank's board of directors, and such approval is noted in the board's minutes.; 6. As soon as it was executed, the agreement was made an official record of the Bank.; and 7. Customer has no financial obligations owing to the Bank." (Petition at p. 17). In the instant case, the alleged agreement does not comply with the 12 U.S.C. § 1823(e)(3) and (4) requirements as hypothesized in 5. and 6. above. Moreover, Petitioners have admitted their indebtedness to the failed REPUBLIC, in contrast to 7. above. (Petition at p. 4) (alleged agreement designed to "reduce Petitioners' indebtedness to the Bank . . . ."). Accordingly, Petitioners' hypothetical scenarios have no basis in fact in this case.

[16] *See* Petition at p. 15: "Petitioners argue primarily that the judgment in question is not supported by precedent in any way, and should therefore be reversed."

issue advisory opinions."); *Rice v. Sioux City Cemetery*, 349 U.S. at 74 ("A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic.") (citations omitted). Indeed, contrary to Petitioners' assertions, the reported decisions demonstrate the development of a consensus among the Circuit Courts of Appeals, not a conflict.

Despite Petitioners' second assertion of conflict regarding whether an affirmative showing of fault is required under *D'Oench, Duhme* (Petition at p. 4), Petitioners subsequently state that they "are unaware of any authorities stating that a showing of fault is not required [under *D'Oench, Duhme*]." (Petition at p. 26). Even if this assertion were true, Petitioners have not established a conflict.

Rather, Petitioners are merely confused and have misstated this Court's test under both *D'Oench, Duhme* and *Langley*. The relevant query is not "fault", but whether the borrower "lent himself to a scheme or arrangement whereby the banking authority . . . was likely to be misled." *Langley*, 484 U.S. at 94 (quoting *D'Oench, Duhme*, 315 U.S. at 460). This Court in *D'Oench, Duhme* went on to state that "[t]hough petitioner was not a participant in this particular transaction and, so far as appears, *was ignorant of it*, nevertheless it was responsible for the creation of the false status of the note in the hands of the bank." *Id.*, 315 U.S. at 461 (emphasis added).

Petitioners are seeking to engraft an equitable exception upon the *D'Oench, Duhme* doctrine by asserting that the borrower must be "at fault" before the doctrine applies. This argument has not only been expressly rejected by this Court

in *Langley* in its consideration of section 1823(e),[17] but has also been rejected by Congress as evidenced by the enactment of FIRREA. The deposit insurance fund and the interests of depositors and general creditors, as both this Court and Congress have recognized, cannot be jeopardized by bank customers who fail to evidence their agreements in the official records of the institution.

Petitioners' vague contention that *FDIC v. Meo,* 505 F.2d 790 (9th Cir. 1974) requires a showing of fault is misguided. *Meo,* a relatively early attempt to analyze *D'Oench, Duhme,* has been often cited by debtors, frequently distinguished by the courts, and rarely followed.[18] Moreover, *Meo* does not hold that an affirmative showing of fault is required for the *D'Oench, Duhme* doctrine to apply.

Petitioners' reliance on the dicta in *FDIC v. Linn*, 671 F. Supp. 547, 555 (N.D. Ill. 1987) is likewise inapposite. In *Linn*, the court stated that while in its opinion an economic duress

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[17] *Id.*, 484 U.S. at 94: "Petitioners are really urging us to engraft an equitable exception upon the plain terms of the statute. Even if we had the power to do so, the equities petitioners invoke are not the equities the statute regards as predominant."

[18] The Ninth Circuit has subsequently narrowed *Meo* on at least three occasions. *See FDIC v. Bank of San Francisco*, 817 F.2d 1395, 1398-99 (9th Cir. 1987); *FDIC v. First Nat'l Fin. Co.*, 587 F.2d 1009, 1011-12 (9th Cir. 1978); and *FSLIC v. Musacchio*, 695 F. Supp. 1044, 1050 (N.D. Cal. 1988). Virtually every other circuit has likewise declined to follow *Meo. See Chatham Ventures, Inc. v. FDIC*, 651 F.2d 355, 361, n.13 (5th Cir. 1981), *cert. denied*, 456 U.S. 972 (1982); *FDIC v. Timbalier Towing Co.*, 497 F. Supp. 912, 921 (N.D. Ohio 1980) (6th Cir.); *FDIC v. Lauterbach*, 626 F.2d 1327, 1339 n.22 (7th Cir. 1980); *FDIC v. R-C Marketing and Leasing, Inc.*, 714 F. Supp. 1535, 1544 (D. Minn. 1989) (8th Cir.); *Castleglen, Inc. v. Commonwealth Sav. Ass'n*, 728 F. Supp. at 669 (10th Cir.); *FSLIC v. Two Rivers Assoc., Inc.*, 880 F.2d 1267, 1274 (11th Cir. 1989).

defense was not barred by section 1823(e), it declined to decide whether the broader *D'Oench, Duhme* doctrine would bar such a defense since the "claims of duress . . . fail on their merits, [and] FDIC has no need for whatever shield federal common law might provide." *Id.* 671 F.Supp. at 555-556. *Linn* further noted that this Court's then pending decision in *Langley* would affect the outcome of duress as a defense to section 1823(e), and correctly acknowledged that after this Court had decided *Langley*, "the decision buttresses FDIC's position here, but the precise effect is for the Court of Appeals to assess . . . ." *Id.*, 671 F.Supp. at 555, n*.

Whatever the opinions and observations in *Linn* may be, dicta alone cannot create a conflict among the Circuits. As this Court has admonished numerous times, "this Court reviews judgments, not opinions." *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 625 n.11 (1986) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *FCC v. Pacifica*, 438 U.S. at 734 (1978) (" 'This Court . . . reviews judgments, not statements in opinions.' ") (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)).

Petitioners have failed to demonstrate any conflict among the Circuit Courts of Appeals, and their Petition for Writ of Certiorari should be denied.

VI. The Court Below Correctly Decided This Matter Under The Standards of D'Oench, Duhme and Langley.

A. The Court Below Correctly Held that Petitioners' Claim for Relief for Fraud was Properly Dismissed.

1. The Unrecorded Side Agreement Adversely Affected Assets of the Failed Bank.

Petitioners' "primary argument" is that *D'Oench, Duhme, Langley*, and section 1823(e) do not apply to the secret,

unrecorded side agreement to extend future loans at issue here because the alleged agreement does not adversely affect Petitioners' admitted outstanding debt to REPUBLIC. (Petition at p. 20).

According to Petitioners, the secret, unrecorded side agreement between them and REPUBLIC provided that Petitioners would obtain funds from their pension and profit-sharing plans to pay off a principal debt obligation (an asset of REPUBLIC) owed by Petitioners to REPUBLIC. In turn, REPUBLIC would "extend open corporate loans so long as [Petitioners] complied with the terms of the agreement." (Original Petition at ¶ 25; Appendix at p. A-7). The effect, according to Petitioners, was that the side "agreement *enhanced* the asset, for it . . . ensured that payments would be made on the debt." (Petition at p. 20) (emphasis in original).

The secret, unrecorded side agreement thus restructured the terms of a principal debt obligation such that repayment of the debt/asset would take place if certain contingencies occurred (*i.e.*, extension of further loans). These contingencies are not properly documented in the failed REPUBLIC's records and do not appear on the face of the principal debt obligation owed by Petitioners to REPUBLIC.

The fraud claims arising from the alleged secret, unrecorded side agreement to extend future loans are the types of claims prohibited by this Court in *D'Oench, Duhme* and *Langley*, and by section 1823(e). This Court's opinion in *D'Oench, Duhme* represents the genesis of the FDIC's special defenses. In that case, the FDIC sued to collect on a note payable to a failed bank. The receipt issued for the note stated that "[t]his note is given with the understanding it will not be called for payment." *Id.* at 454. The borrower asserted, *inter alia*, this receipt as a defense to the note, which this Court denied as a matter of public policy, stating:

> [I]t is the *'evil tendency'* of the acts to contravene the policy governing banking transactions which lies at the root of the rule.
>
> Those principles are applicable here because of the federal policy evidenced in this Act to protect respondent, a federal corporation, from misrepresentations made to induce or influence the action of respondent, including misstatements as to the genuineness or integrity of securities in the portfolios of banks which it insures or to which it makes loans.

Id. at 459 (citations omitted; emphasis added). Finally, this Court concluded: "If the secret agreement were allowed as a defense in this case the maker of the note would be enabled to defeat the purpose of the statute by taking advantage of an undisclosed and fraudulent arrangement which the statute condemns and which the maker of the note made possible." *Id.* at 461.

The essence of this Court's decision in *D'Oench, Duhme* is that a person dealing with an FDIC-insured institution may not assert a claim or defense against the FDIC which is based upon a secret, unrecorded side agreement with a failed bank because the borrower has, no matter how innocently, lent himself to a scheme which would tend to deceive the banking authorities. Thus, it does not matter whether the secret, unrecorded side agreement enhances, degrades or is neutral with respect to any specific asset or the assets generally of the failed bank. The *evil* condemned in *D'Oench, Duhme* is the *tendency* to deceive the banking authorities, not the type of deception.

Following this Court's creation in *D'Oench, Duhme* of federal common law protections for the FDIC against secret, unrecorded side agreements, Congress itself recognized the importance of such protections and enacted 12 U.S.C.

§ 1823(e).[19] *FDIC v. Castle*, 781 F.2d 1101, 1106 (5th Cir. 1986).

Section 1823(e) was the subject of extensive review by this Court only three years ago in *Langley*, 484 U.S. 86. In that case, the borrowers purchased certain real estate by obtaining a loan from the bank, and asserted that "the notes had been procured by the bank's misrepresentations" as to the acreage to be conveyed. *Id.* at 89. "No reference to these representations appears in the documents executed by the Langleys, in the bank's records, or in the minutes of the bank's board of directors or loan committee." *Id.* The bank thereafter failed and the FDIC intervened in the suits. In considering the purpose of section 1823(e), this Court stated that bank examiners must be able "to rely on a bank's records in evaluating the worth of the bank's assets", especially when evaluations relating to liquidating a failed bank must be made "with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services." *Id.* at 91. (citation omitted).

This Court rejected the argument that the word "agreement" did not include a fraudulent misrepresentation: "[n]o conceivable reading of the word 'agreement' in § 1823(e) could cause it to cover a representation or warranty that is bona fide but to exclude one that is fraudulent." *Id.* at 93. Harsh as this result may be, this Court focused on the *policy* to protect the FDIC as the basis for its decision:

> [T]he equities petitioners invoke are not the equities the statute regards as predominant. While the borrower who has relied upon an erroneous or even fraudulent unrecorded representation has some claim to consideration, so do those who are harmed by his failure to

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[19] *See* Appendix at p. A-1.

> protect himself by assuring that his agreement is approved and recorded in accordance with the statute.

Id. at 94. (citations omitted). This Court concluded that fraudulent misrepresentations were on the same footing as unrecorded side agreements for purposes of the FDIC's defenses and could not be asserted against the FDIC. *Id.* at 93. Thus, unrecorded warranties or preconditions to a contract are not binding on the FDIC because they thwart the policies of full disclosure which protect the banking system and its creditors.

Application of the above stated principles to the instant case demonstrates that *D'Oench, Duhme, Langley,* and section 1823(e) bar Petitioners' claims based upon the secret, unrecorded side agreement which would have altered the repayment terms of an asset of the failed REPUBLIC. Petitioners concede that *D'Oench, Duhme* and section 1823(e) bar unrecorded side agreements. (Appendix at pp. A-45 through A-46). Petitioners insist, however, that *D'Oench, Duhme* and *Langley* do not apply here since the unrecorded side agreement allegedly did not *adversely* affect a specific asset of the failed REPUBLIC, but rather *enhanced* the value of the asset. As discussed above, such is not the test.

Petitioners further defy logic in asserting that (1) "[t]he only specific asset of the [failed REPUBLIC] which was affected by the [secret, unrecorded side] agreement was Petitioners' outstanding debt to the [failed REPUBLIC]" (Petition at p. 20 and Appendix at p. A-92); (2) that the exact purpose of the secret, unrecorded side agreement was to alter the payment obligations of the debt since the agreement allegedly "ensured that payments would be made on the debt." (Petition at p. 20 and Appendix at p. A-92); (3) that Petitioners' "primary complaint is that the Bank breached the [side] agreements" (Appendix at pp. A-93 through A-94); and then conclude that (4) the agreement did not "*adversely*

affect [an] asset [of the failed REPUBLIC]." (Petition at p. 20; emphasis added). This conclusion does not follow from the premises stated.

First, if compliance with the secret, unrecorded side agreement ensured that payments would be made on the debt and thus *enhanced* the debt's value, then the converse must also be true: if either party failed to comply with and/or breached the secret, unrecorded side agreement, then there would no longer be any assurance that payments would be made on the debt, and the agreement would thus *adversely affect* the assets' value.

Second, applying this Court's analysis in *D'Oench, Duhme* and *Langley* to the alleged agreement between Petitioners and REPUBLIC, it is obvious that the alleged agreement is not clearly evidenced in the bank's records, and would not be apparent to bank examiners. *Beighley v. FDIC*, 868 F.2d at 784. Further, and by analogy to section 1823(e), it is also clear that there is no attempt by Petitioners to demonstrate that the alleged agreement meets any of the section 1823(e) requirements, other than that it is in writing.[20] There is no allegation that the alleged agreement was executed by the bank contemporaneously with the acquisition of the asset by the bank; that the alleged agreement was approved by the board of directors or the loan committee, with the approval reflected in the minutes; nor that the alleged agreement was, continuously from the time of its execution, an official record of the bank. (Original Petition; Appendix at pp. A-3 through A-9).

Again, one of the purposes of the *D'Oench, Duhme* doctrine and of section 1823(e) is to ensure that the bank examiners

[20] Petitioners concede that "[t]hese written agreements might not meet all the requirements of § 1823(e) . . . .". (Appendix at p. A-108).

and the FDIC have an accurate picture of the failed bank's assets and liabilities and of the solvency of the institution. If an agreement is not properly documented according to these principles and requirements, "[n]either the FDIC nor state banking authorities would be able to make reliable evaluations" of a bank's assets and liabilities. *Langley*, 484 U.S. at 91-92. Since the alleged agreement in this case does not comply with the requirements of either *D'Oench, Duhme* or by analogy with section 1823(e), Petitioners may not assert any claim arising from the alleged breach of a secret, unrecorded side agreement likely to deceive the banking authorities.

2. D'Oench, Duhme Bars Affirmative Claims Based Upon An Unrecorded Side Agreement To Extend Future Loans.

Even if this Court accepts Petitioners' argument that the unrecorded side agreement did not adversely affect a *specific* asset of the failed REPUBLIC, the *D'Oench, Duhme* doctrine, as explained in *Langley*, should still be applied to defeat Petitioners' affirmative claims based upon a secret, unrecorded side agreement.

If Petitioners were permitted to recover on their secret, unrecorded side agreement which allegedly "ha[s] nothing to do with the collectability" (Appendix at p. A-72) of their note and loan obligations, any such recovery, if successful, would diminish the value of the general assets of the failed REPUBLIC. Such a result is directly contrary to the policies underlying the special protections provided to the FDIC and bridge banks such as NCNB by statute and federal common law.

As this Court's decision in *D'Oench, Duhme* makes clear, there is a federal policy to protect FDIC and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which

the FDIC insures. *Id.* at 459. Further, in order to evaluate the worth of a bank's assets, it is obvious that the liabilities of the failed bank must also be considered. *Langley*, 484 U.S. at 91 (bank examiners must be able "to rely on a bank's records in evaluating the worth of the bank's assets [especially] when the FDIC is deciding . . . to provide financing for purchase of its assets (*and assumption of its liabilities*) by another bank . . . .") (citations omitted; emphasis added).

It is a matter of simple accounting and arithmetic: in order for the FDIC to evaluate the total worth of a failed bank, it cannot simply look at one side of the balance sheet. The FDIC must offset against the assets the amount of the bank's liabilities. If the bank's liabilities are based on secret, unrecorded side agreements not properly documented in the failed bank's records, then the FDIC is unable to make a thorough and accurate evaluation of the total worth of the failed bank. *See Langley*, 484 U.S. at 91; *Gunter v. Hutcheson*, 674 F.2d 862, 871 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982) (section 1823(e) requires FDIC to make a "risk assessment" before implementing a purchase and assumption transaction for a failed bank). Likewise, if a party were allowed to recover on a secret, unrecorded side agreement which may not relate to a specific asset of a failed bank, the result would be the same, since any such recovery would be paid from the total assets of the failed bank and would directly affect truly innocent depositors and creditors who would be "harmed by [Petitioners'] failure to protect [themselves] by assuring that [their] agreement is approved and recorded in accordance with the statute." *Langley*, 484 U.S. at 94.

Thus, any hypertechnical application of the *D'Oench, Duhme* doctrine as urged by Petitioners is prohibited by the policies and principles of *D'Oench, Duhme, Langley*, and section 1823(e), which apply to bar recovery on all secret,

unrecorded side agreements entered into between Petitioners and REPUBLIC.

3. The Court Below Correctly Decided that Petitioners' Claim for Relief for Fraud Against NCNB, a Bridge Bank, was Properly Dismissed.

As previously stated, Petitioners have not contested the lower court's holding dismissing Petitioners' claims for relief against NCNB, a Bridge Bank, and Petitioners have thus waived any argument to the contrary.[21] Nevertheless, the court below correctly held that Petitioners' claim for relief for fraud against NCNB was properly dismissed.

Affirmative defenses, claims, and counterclaims barred as to the FDIC under the doctrine of *D'Oench, Duhme* are equally barred as to NCNB, the bridge bank created by the FDIC to acquire a portion of the assets and assume certain liabilities of the former First RepublicBank institutions. *Porras v. Petroplex Sav. Ass'n,* 903 F.2d 379, 381 (5th Cir. 1990) (assignee of FDIC entitled to protection of *D'Oench, Duhme); FSLIC v. Murray,* 853 F.2d 1251, 1256 (5th Cir. 1988) (assignee of FDIC takes free of defenses); *FDIC v. Cremona Co.,* 832 F.2d 959, 964 (6th Cir. 1987), *cert. dism'd sub. nom., Gonda v. FDIC,* 485 U.S. 1017 (1988) (assignee of FDIC not subject to side agreement provisions limiting liability on instrument); *FDIC v. Newhart,* 713 F. Supp. 320, 324 (W.D. Mo.), *aff'd,* 892 F.2d 47 (8th Cir. 1989) (assignee of FDIC afforded FDIC's protections); *RSR Properties, Inc. v. FDIC,* 706 F. Supp. 524, 531 (W.D. Tex. 1989) (claims barred as to FDIC are equally barred as to NCNB).

Refusing to so extend the *D'Oench, Duhme* doctrine would both undermine federal banking policy and eviscerate 12

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[21] *See* Section II, *supra,* at pp. 6-7.

U.S.C. § 1821(n) (1990),[22] which expressly authorizes the use of bridge banks. If a bridge bank is not allowed the protection of *D'Oench, Duhme,* but instead faces nonpayment of every note to which an alleged secret, unrecorded side agreement is attached, such would render section 1821(n) ineffective and deprive the FDIC of one of the most economical means of continuing normal banking operations. Accordingly, the creditors, a group that this Court in *D'Oench, Duhme* and Congress specifically desired to protect, are better protected by a rule that extends *D'Oench, Duhme* to an assignee of the FDIC.

Pragmatically speaking, the mechanics of section 1821(n) contemplate that *D'Oench, Duhme* will apply to an assignee of the FDIC. One standard for creating a bridge bank is that the cost associated with establishing and operating a bridge bank will be less than the cost of liquidation. 12 U.S.C. § 1821(n)(2)(A) (1990). Therefore, the FDIC must be able to evaluate accurately the worth of a failed bank in order to make such a cost determination. Without the protections of the *D'Oench, Duhme* doctrine, an accurate economic assessment is impossible: "[n]either the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contain seemingly unqualified notes that are in fact subject to undisclosed conditions." *Langley,* 484 U.S. at 91-92.

Moreover, section 214 of FIRREA expressly extends the protections granted to the FDIC in both its capacities in 12 U.S.C. § 1823(e) to a bridge bank. *See* 12 U.S.C. § 1821(n)(4)(I) (1990): "[N]o agreement which tends to diminish or defeat the right, title or interest *of a bridge bank* in any asset of an insured bank in default acquired by it shall

[22] 12 U.S.C. § 1821(n) was previously codified at 12 U.S.C. § 1821(i) (1988).

be valid against the bridge bank ....") (emphasis added). (Appendix at p. A-2).

In the instant case, any of the defenses available to the FDIC under *D'Oench, Duhme* and related cases are likewise available to NCNB. Petitioners cite no authority to the contrary, and their Petition for a Writ of Certiorari should therefore be denied.

4. D'Oench, Duhme and Section 1823(e) Do Not Require A Finding of Fault As A Condition Precedent.

Petitioners assert in their "secondary argument" that since they "are unaware of any authorities stating that a showing of fault is not required" before *D'Oench, Duhme* applies to bar a secret, unrecorded side agreement, then it must somehow follow that *D'Oench, Duhme* requires a showing of fault. The argument continues that since Petitioners are innocent and without "fault", the *D'Oench, Duhme* doctrine is inapplicable to this case. (Petition at p. 26).

One need only refer to this Court's opinion in *D'Oench, Duhme* to determine the weakness of Petitioners' position. As previously stated,[23] the pertinent inquiry is not the debtor's fault, innocence, or even "ignorance" of a particular transaction, but whether the obligor has lent himself "to a scheme or arrangement whereby the banking authority on which the [FDIC] relied ... was or was likely to be misled." *Id.* at 460.

Petitioners point to no case specifically requiring an affirmative showing of fault before the *D'Oench, Duhme* doctrine applies.[24] Nevertheless, even if this were the standard, there

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[23] *See* Section V, *supra*, at p. 13.

[24] The inapplicability of *Meo* and *Linn* to this case has been demonstrated previously at pp. 14-15, *supra*.

is an ample demonstration of "fault" on the part of Petitioners sufficient to invoke the doctrine.

Despite Petitioners' protestations that it was "forced under [economic] duress" (Petition at p. 25) to enter into the secret, unrecorded side agreement, it was Petitioners who: voluntarily "sought assistance from the Bank" (Petition at p. 3); who entered into the secret, unrecorded side agreement whereby REPUBLIC was "obligated to work with [Petitioners]" (Petition at p. 4) and was to extend open corporate loans to Petitioners (Original Petition at ¶ 25; Appendix at p. A-7); who had the power to and allegedly would not have entered into the secret, unrecorded side agreement had they known of REPUBLIC's allegedly fraudulent intent (Original Petition at ¶ 28; Appendix at p. A-8); and finally who "fail[ed] to protect [themselves] by assuring that [their side] agreement is approved and recorded in accordance with [section 1823(e)]." *Langley*, 484 U.S. at 94. Under these circumstances, it can hardly be denied that Petitioners have *lent themselves* to a scheme likely to deceive banking authorities, and Petitioners should bear the consequences of their involvement, rather than the truly innocent depositors or creditors. *Id.*

It is clear that no showing of fault is required. Further, Petitioners' Original Petition amply demonstrates that Petitioners lent themselves to a scheme such that *D'Oench, Duhme* bars any and all of their claims for fraud based upon a secret, unrecorded side agreement.

5. Agreement in Writing.

Petitioners make the bold statement that since the alleged "agreement was in writing . . . such fact takes the agreement out from under *D'Oench*." (Petition at pp. 11-12).

Petitioners cite no case for this proposition. In *D'Oench, Duhme* itself, the side agreement was embodied in a written

receipt with the statement that "[t]his note is given with the understanding that it will not be called for payment." *Id.*, 315 U.S. at 454. This Court's decision in that case barring enforcement of such an agreement against the FDIC did not turn upon whether the side agreement was written; rather, the harm perceived by this Court was that the agreement was not contained in the bank's official records and the "evil tendency" of such omission to deceive the banking authorities as to the true worth of the assets of the bank. *Id.*, 315 U.S. at 456.

The mere fact that the alleged side agreement in this case was in writing in no way removes it from the purview of the protections afforded Respondents under the *D'Oench, Duhme* doctrine. As this Court noted in *Langley* with respect to section 1823(e), "The short of the matter is that Congress opted for the certainty of the requirements set forth in § 1823(e)." 484 U.S. at 95. This Court should require no less a standard in applying the half-century-old *D'Oench, Duhme* doctrine.

6. Fraudulent Inducement.

Petitioners attempt to revive their basic claim for fraudulent inducement asserting that it should not be barred because the alleged side agreement neither altered the written terms of their admitted obligation to the failed bank nor involved an agreement that was entered into voluntarily. (Petition at p. 26).

As previously discussed, the alleged side agreement constitutes a condition imposed upon the obligation to repay the debt to the failed REPUBLIC, and Petitioners lent themselves to a scheme likely to deceive the banking authorities with respect to that obligation. Thus, as this Court held in *Langley*, such fraud in the inducement is barred as to the FDIC. *Id.*, 484 U.S. at 93. *See FDIC v. Kratz*, 898 F.2d 669, 671 (8th Cir. 1990). Petitioners' claims for fraud in the inducement must likewise fail.

7. The Unrecorded Side Agreement Does Not Constitute a Bilateral Obligation.

Petitioners insist that the unrecorded side agreement is not barred under *D'Oench, Duhme* due to "bilateral obligations". (Petition at p. 27). First, before a "bilateral obligation" is enforceable against the FDIC, the agreement must meet *D'Oench, Duhme* and section 1823(e) requirements.

Petitioners' reliance upon *Howell v. Continental Credit Corp.*, 655 F.2d 743 (7th Cir. 1981) is misplaced since all of the conditions that plaintiff in that case sought to enforce against the FDIC's asset, a lease, appeared on the face of the asset itself rather than in a side agreement. Moreover, since the *Howell* decision was rendered, the Seventh Circuit has recognized that the broad language of that opinion "must not be ripped from its context to make a rule far broader than the factual circumstances which called forth the language." *FDIC v. O'Neil*, 809 F.2d 350, 354 (7th Cir. 1987).

In the instant case, all of the terms Petitioners seek to enforce are contained in an unrecorded side agreement which Petitioners admit "might not meet all the requirements of section 1823(e). . . ." (Appendix at p. A-108). Where, as here, there is an unrecorded side agreement that does not comply with section 1823(e) and *D'Oench, Duhme* requirements, such an agreement is not enforceable against Respondent NCNB.

CONCLUSION

For the reasons stated above, NCNB and JOBE request that the petition for writ of certiorari be denied in all respects.

Respectfully submitted,

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July 1990

No. 89-1893

In The
Supreme Court of the United States

October Term, 1989

Bell & Murphy and Associates, Inc.,
John W. Bell, Jr.,
Harold D. Barnett, Robert D. Hamer, Jr.,
and Richard L. Mears,

Petitioners,

v.

Federal Deposit Insurance Corporation, as
Receiver of First RepublicBank Dallas, N.A.,
(F/K/A First RepublicBank Gateway, N.A.) and
NCNB Texas National Bank, N.A., and
Charles E. Jobe,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

I, WILLIAM FRANK CARROLL, a member of the Bar of this Court, hereby certify that on this 23d day of July, 1990, three copies of Respondents' NCNB Texas National Bank, N.A.'s and Charles E. Jobe's Brief in Opposition in the above entitled case were mailed, first class postage prepaid, to Joseph E. Ashmore, Esq., 3710 Rawlins, Suite 1210, Dallas, Texas 75219, counsel for petitioners herein; and Kenneth W. Starr, Esq., Office of the Solicitor General, United States Department of Justice, Washington, D.C. 20530, counsel for respondent Federal Deposit Insurance Corporation as Receiver of First RepublicBank Dallas, N.A. I further certify that all parties required to be served have been served.

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Counsel for Respondents,
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Bank, N.A.,
and Charles E. Jobe

APPENDIX

12 U.S.C. § 1823(e) (1988) provides:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

12 U.S.C. § 1823(e) (1990) provides:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement (1) is in writing, (2) was executed by the depository institution and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution, (3) shall have been approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1821(d)(9)(A) (1990) provides:

Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation.

12 U.S.C. § 1821(n)(4)(I)(1990) provides that:

(I) no agreement which tends to diminish or defeat the right, title or interest of a bridge bank in any asset of an insured bank in default acquired by it shall be valid against the bridge bank unless such agreement —
(i) is in writing,
(ii) was executed by such insured bank in default and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by such insured bank in default,
(iii) was approved by the board of directors of insured bank in default or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
(iv) has been, continuously, from the time of its execution, an official record of such insured bank in default.

No. 352-112460

Bell & Murphy and Associates, Inc., John W. Bell, Jr., Harold D. Barnett, Robert D. Hamer, Jr. and Richard L. Mears *Plaintiffs,* vs. Interfirst Bank Gateway, N.A. and Charles E. Jobe *Defendants.*	IN THE 352 JUDICIAL DISTRICT COURT OF TARRANT COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, BELL & MURPHY and ASSOCIATES, INC., ("BMA") JOHN W. BELL, JR., HAROLD D. BARNETT, ROBERT D. HAMER, JR. and RICHARD L. MEARS, Plaintiffs, complain of Defendants, INTERFIRST BANK GATEWAY, N.A. ("INTERFIRST") and CHARLES E. JOBE and respectfully show the Court the following:

I.

PARTIES

1. Plaintiff Bell & Murphy and Associates, Inc. is a Texas Corporation, duly formed and existing under the laws of the State of Texas and has its principal place of business in Dallas, Dallas County, Texas.

2. Plaintiffs John W. Bell, Jr. and Robert W. Hamer, Jr. are residents of Dallas, Dallas County, Texas.

3. Plaintiff Harold D. Barnett is a resident of Denton, Denton County, Texas.

4. Plaintiff Richard L. Mears is a resident of Midland, Texas.

5. Defendant Interfirst Bank Gateway, N.A., is a corporation having its principal office in Tarrant County, Texas. Defendant Interfirst may be served with citation by delivery of citation to its president, Charles E. Jobe at 3532 Joyce, Fort Worth, Texas 76116.

6. Defendant Charles E. Jobe is an individual resident of Fort Worth, Tarrant County, Texas and may be served with process by mailing a true copy of the citation with a copy of Plaintiff's Petition attached thereto, by certified mail, delivery restricted to addressee only, return receipt requested, to Jobe's place of business located at Interfirst Bank Gateway, N.A., 3532 Joyce, Fort Worth, Texas 76116.

II.

JURISDICTION AND VENUE

7. Venue is proper in Tarrant County, Texas pursuant to Section 15.001, Texas Civil Practice and Remedies Code. This is an action for fraud with the subject matter of this action having occurred in Fort Worth, Tarrant County, Texas.

III.

BACKGROUND

8. All Plaintiffs have joined in this action due to the fact that the cause of action asserted herein arises out of a transaction common to all Plaintiffs. Consequently, this action can be said to involve the same questions of law and the same questions of fact with respect to each Plaintiff's claim against Defendants.

9. Plaintiffs in this action are comprised of former officers and former employees of BMA.

10. BMA's primary business objectives involved consultation, interpretation of seismic data and exploration for potential oil and gas reservoirs.

11. Due to the general nature of the Texas economy and the nature of the oil and gas industry as a whole, BMA's financial condition in 1985 was deteriorating. In 1985 BMA began experiencing cash flow problems as well.

12. As a result of a seventeen (17) year history at InterFirst, BMA established a quality reputation. As a result, BMA's cash flow problems were countered by Defendants in 1985.

13. In 1985, Defendants verbally agreed to honor all payroll tax checks that resulted in an overdraft on BMA's checking account.

14. By April of 1986, Defendants effectively controlled the corporate operations of BMA, and at this point, Defendants arbitrarily honored certain checks while not honoring other checks issued by BMA.

15. Specifically, Defendants no longer honored checks written by BMA to the Internal Revenue Service expressly for payroll tax purposes. Defendants had knowledge that said checks were for payroll taxes as they were duly labeled and presented, by BMA, to Defendants. Defendant, in violation of the verbal agreement, did not cover BMA checks for payroll taxes in the second, third and fourth quarter of 1985 and the first quarter of 1986.

16. As a result of BMA's continuing financial problems, Defendants began demanding that BMA to obtain corporate loans from BMA's pension plan and profit sharing plan.

17. BMA, desiring to continue its relations with Defendant on the best possible level, attempted to obtain loans from its profit sharing plan and its pension plan. It was determined

that BMA would have to follow a procedure, as per Employee Retirement Income Security Act, which would require a minimum of six to nine months before the loans could be obtained.

18. Defendants, at that time, were unwilling to wait six months and told BMA to find a way to get a loan from these plans. BMA determined that its employees could borrow from these plans on an individual basis whereupon each individual would loan these monies to BMA.

19. Defendants demanded BMA obtain these loans. In January 1986, Jobe wrote an offer stating "an investment from BMA was now required to keep it in operation". This offer was presented to the employees of BMA. The offer provided for the funds from the pension plan to be used to cancel a portion of the debt held by Defendants. The funds from the profit sharing plan were to be used to extinguish a debt held by the Internal Revenue Service.

20. The letter agreement by Defendants was a fraudulent inducement to the employees of BMA. The bank used the letter to fraudulently gain control of assets beyond the bank's control.

21. Once this proposed offer was accepted by BMA and its employees and once the process of obtaining these loans was well on its way to completion, Defendant notified BMA that its original plan was not sufficient. At this point, Defendants demanded that the loans from each plan be lumped together whereupon a two-thirds share of all monies was to be taken by Defendant and one-third was to be given to the Internal Revenue Service. BMA, as a result of its economic position, had no viable alternatives when Defendant, contrary to its original offer which had been accepted by Plaintiffs, shifted its position. This shift in position by the bank caused Plaintiffs to accept Defendants offer under economic duress.

22. The Contract structured according to Jobe's whim fell into place on or about April 1, 1986. This Contract called for BMA's account receivables to be paid to Defendants, it called for the employees individual loans to the corporation to be paid two-thirds to the Defendant and one-third to the Internal Revenue Service; it called for BMA to change its pay period to semi-monthly; it called for BMA to reduce the salaries of its senior executives to a level that only met minimum living obligations and the agreement called for BMA to reduce the pay to other employees and officers of BMA by fifteen percent.

23. All of the conditions imposed by Defendants upon BMA were met. The agreement, in effect, was designed to allow BMA to continue to operate while Defendants were to loan money to BMA for any overdrafts, including payroll checks, checks to the Internal Revenue Service for payment of withholding taxes and other checks for necessary operating expenses.

24. Defendants during the operation of the agreement were continually recovering monies from BMA's accounts receivables. At least one million dollars in consulting fees were being billed on an annual basis and at no time did the overdraft account exceed the total amount owed to BMA.

IV.

CAUSE OF ACTION

25. As a result of BMA's total compliance with every obligation of the letter agreement imposed by Defendants, BMA was to have been able to operate without limitation. In other words, Defendant was obligated to "work" with the corporation and was to extend open corporate loans so long as BMA complied with the terms of the agreement.

26. Defendants InterFirst and Jobe, upon extending the offer to BMA, knew that BMA was on the verge of financial ruin. Defendants also knew that it stood to lose money if BMA failed prior to obtaining loans from its profit sharing plan and pension plan.

27. As a result of this knowledge, Defendants knowingly made false representations of material facts to BMA. Said misrepresentations were made with the intent to induce Plaintiffs to obtain loans from their profit sharing and pension plans so that Defendant could reduce the outstanding balance owed by BMA.

28. Plaintiffs submit the above representations concerned material facts for the reason that Plaintiffs would not have pursued and obtained loans from either the profit sharing plan or the pension plan had Defendant's intent (to reduce the sum owed by BMA as quickly as possible without regard to whether BMA survived the economic crisis it was experiencing) been known by Plaintiffs. The above representations of Defendant were relied on by Plaintiffs to their substantial injury and damage.

V.

DAMAGES

29. By reason of Plaintiffs' reliance upon Defendants' misrepresentations described above, Plaintiffs have been damaged in an amount in excess of the minimum jurisdictional limits of the Courts.

30. Plaintiffs further allege that by reason of the fact that Defendants knew that the representations were false at the time they were made, said representations were willful and malicious and constitute conduct for which the law allows the imposition of exemplary damages. In this connection Plaintiffs will show that they have incurred significant ex-

penses, including attorney's fees, in the investigation and prosecution of this action. Accordingly, Plaintiffs request that exemplary damages be awarded against the Defendant in a sum which exceeds the minimum jurisdictional limits of the Court.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant be cited to appear and answer and that on final trial, Plaintiff have:

1. Judgment against Defendants for actual damages in a sum in excess of the minimum jurisdictional limits of the Court, with interest at the lawful rate from April 1, 1988 until Judgment;

2. Judgment against Defendants for exemplary damages in a sum to be determined by the trier of fact;

3. Interest after Judgment at the rate of 10 percent per annum until paid;

4. Costs of suit; and

5. Such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

VASSALLO & ASHMORE, P.C.

By: [SIG]
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ATTORNEYS FOR PLAINTIFFS

IN THE
United States District Court
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BELL & MURPHY AND ASSOCIATES, INC., JOHN W. BELL, JR., HAROLD D. BARNETT, ROBERT D. HAMER, JR. and RICHARD L. MEARS, *Plaintiffs*, v. CHARLES E. JOBE AND FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR FIRST REPUBLICBANK DALLAS, N.A., (F/K/A/ FIRST REPUBLICBANK GATEWAY, N.A.) and NCNB TEXAS NATIONAL BANK, *Defendants*.	CIVIL ACTION NO. CA 4-88-553-E

MOTION TO DISMISS

The FEDERAL DEPOSIT INSURANCE CORPORATION ("FDIC") as Receiver for FIRST REPUBLICBANK DALLAS, N.A. (f/k/a/ First RepublicBank Gateway, N.A.) ("REPUBLIC") and NCNB TEXAS NATIONAL BANK ("NCNB") move this Court, pursuant to FED. R. CIV. P. 12(b)(6) to dismiss this action and would show the Court the following:

1. The FDIC was appointed as Receiver for REPUBLIC on July 29, 1988.

2. Plaintiffs' Original Petition ("Petition") fails to state a claim for relief against the FDIC and NCNB under *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

3. This action should be dismissed to the extent it seeks exemplary damages and attorneys' fees for the further reason that the FDIC and NCNB are not subject to liability for exemplary damages or attorneys' fees.

4. This action, on the Court's own motion, should be dismissed against Defendant CHARLES E. JOBE ("JOBE") pursuant to FED. R. CIV. P. 12(b)(6) since the Petition makes no allegation against JOBE that any of his alleged acts or representations were made outside the scope of his employment as president of the failed REPUBLIC.

WHEREFORE, the FDIC and NCNB pray that this Court dismiss this action as to the FDIC and NCNB, that the FDIC and NCNB recover their costs, and that they have such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

BAKER, MILLS & GLAST, P.C.
WILLIAM FRANK CARROLL
JOHN MITCHELL NEVINS
BRUCE L. COLLINS III

Original Signed by
By: William Frank Carroll
WILLIAM FRANK CARROLL

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Attorneys for Defendant, FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for FIRST REPUBLIC-BANK DALLAS, N.A. (f/k/a First RepublicBank Gateway, N.A.) and NCNB TEXAS NATIONAL BANK, N.A.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss was served upon Joseph E. Ashmore, Jr. Esq., Vassallo & Ashmore, P.C., 3710 Rawlins, Suite 1200, Dallas, Texas 75219, Counsel for Plaintiffs, by depositing the same in the United States mail, proper postage prepaid, certified and return receipt requested, on this 2nd day of February, 1989.

Original Signed by
William Frank Carroll

IN THE
United States District Court
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BELL & MURPHY AND ASSOCIATES, INC., JOHN W. BELL, JR., HAROLD D. BARNETT, ROBERT D. HAMER, JR. and RICHARD L. MEARS, *Plaintiffs*, vs. CHARLES E. JOBE AND FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR FIRST REPUBLICBANK DALLAS, N.A., (F/K/A/ FIRST REPUBLICBANK GATEWAY, N.A.) and NCNB TEXAS NATIONAL BANK, *Defendants*.	CIVIL ACTION NO. CA 4-88-553-E

BRIEF IN SUPPORT OF MOTION TO DISMISS

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BRIEF IN SUPPORT OF MOTION TO DISMISS

The FEDERAL DEPOSIT INSURANCE CORPORATION ("FDIC") as Receiver for FIRST REPUBLICBANK DALLAS, N.A. (f/k/a First RepublicBank Gateway, N.A.), and NCNB TEXAS NATIONAL BANK ("NCNB") have moved this Court, pursuant to FED. R. CIV. P. 12(b)(6), to dismiss this action in its entirety as to the FDIC and NCNB for failure to state a claim upon which relief can be granted. The following arguments and authorities are submitted in support of the Motion to Dismiss.

I. STATEMENT OF THE CASE

This action was originally filed by BELL & MURPHY AND ASSOCIATES, INC., JOHN W. BELL, JR., HAROLD D. BARNETT, ROBERT D. HAMER, JR., AND RICHARD L. MEARS (hereafter collectively referred to as "PLAINTIFFS") against FIRST REPUBLICBANK DALLAS[1] (f/k/a First RepublicBank Gateway f/k/a InterFirst Bank Gateway, N.A.) ("REPUBLIC") and CHARLES E. JOBE (hereafter collectively referred to as "DEFENDANTS") in the 352nd Judicial District, Tarrant County, Texas as Cause No. 352-112460-88. On August 26, 1988 the FDIC intervened as a party defendant and removed this action to the United States District Court for the Northern District of Texas, Fort Worth Division, pursuant to 12 U.S.C. § 1819 (Fourth).[2] The FDIC's Motion to Dismiss is directed to Plaintiffs' Original Petition (the "Petition") which alleges claims for fraud, actual and exemplary damages, attorneys' fees and interest.

The FDIC and NCNB have moved this Court, pursuant to FED. R. CIV. P. 12(b)(6), to dismiss this action under the doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) for failure to state a claim upon which relief may be granted.

The FDIC and NCNB have further moved to dismiss those portions of the Petition, pursuant to FED. R. CIV. P. 12(b)(6), to the extent recovery of exemplary damages and attorneys' fees are sought because exemplary damages and

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[1] On July 29, 1988 the Comptroller of the Currency declared REPUBLIC insolvent pursuant to 12 U.S.C. § 191. On that same date the FDIC was appointed as receiver for REPUBLIC pursuant to 12 U.S.C. § 1821(c).

[2] On September 9, 1988, the FDIC filed its Amended Petition for Removal, adding Charles E. Jobe as a party requesting removal to this court.

attorneys' fees are not recoverable from the FDIC in its capacity as receiver of REPUBLIC nor from NCNB.

II. STATEMENT OF FACTS[3]

In their Petition, PLAINTIFFS allege that they were primarily engaged in the business of consultation and exploration in the oil and gas business. (Petition, ¶ 10). Because of the deterioration of the oil and gas industry, PLAINTIFFS' financial condition also deteriorated in 1985. (Petition, ¶ 11). Due to PLAINTIFFS' "quality reputation", however, PLAINTIFFS' cash flow problems were "countered" in 1985 (Petition, ¶ 12) by DEFENDANTS orally agreeing to honor certain checks that resulted in overdrafts in PLAINTIFFS' checking account. (Petition, ¶ 13). By April, 1986, DEFENDANTS allegedly controlled the corporate operations of PLAINTIFFS and arbitrarily, and in violation of the oral agreement, honored certain checks while not honoring other checks issued by PLAINTIFFS. (Petition, ¶ 14).

PLAINTIFFS allege that DEFENDANTS violated the oral agreement and did not honor PLAINTIFFS' checks to the Internal Revenue Service ("IRS") for payroll taxes in the second, third, and fourth quarters of 1985 and the first quarter of 1986. (Petition, ¶ 15).

PLAINTIFFS allege that as a result of their continuing financial problems, DEFENDANTS began demanding that PLAINTIFFS obtain corporate loans from their pension plan and profit sharing plan (Petition, ¶ 16) which PLAINTIFFS determined would require at least six to nine months. (Petition, ¶ 17). DEFENDANTS were allegedly unwilling to wait

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[3] Solely for the purpose of the Motion to Dismiss, the FDIC accepts the allegations of the Petition. However, many of such allegations have no basis in fact.

and told PLAINTIFFS to find a way to get a loan from these plans, which PLAINTIFFS did. (Petition, ¶ 18).

In January 1986, DEFENDANTS allegedly proposed a letter side agreement to the effect that the pension and profit sharing plan funds would be used to cancel a portion of the debt owed to DEFENDANTS and the IRS. (Petition, ¶ 19). This side agreement allegedly fraudulently induced PLAINTIFFS to allow DEFENDANTS to gain control of new assets then beyond DEFENDANTS' control. (Petition, ¶ 20).

DEFENDANTS then allegedly notified PLAINTIFFS that the original side agreement was not sufficient and demanded that the loans from each plan be combined together and two-thirds of all monies be paid to DEFENDANTS and only one-third to the IRS. PLAINTIFFS, as a result of their economic position, allegedly had no alternative but to comply because of economic duress. (Petition, ¶ 21).

PLAINTIFFS allegedly complied with all of the conditions imposed by DEFENDANTS under the amended side agreement. The side agreement, according to PLAINTIFFS, was designed to allow PLAINTIFFS to operate without limitation, and DEFENDANTS were obligated to "work" with PLAINTIFFS and extend open corporate loans so long as PLAINTIFFS complied with the terms of the side agreement. (Petition, ¶ 25).

DEFENDANTS allegedly knew that PLAINTIFFS were on the verge of financial ruin and knew that DEFENDANTS would lose money if PLAINTIFFS' business failed prior to obtaining the loans from their pension and profit sharing plans. (Petition, ¶ 26). As a result of this knowledge, DEFENDANTS "knowingly" made false representations of material facts to PLAINTIFFS with the intent to induce PLAINTIFFS to obtain loans from their profit sharing and pension plans so that DEFENDANTS could reduce the outstanding balance owed by PLAINTIFFS. (Petition, ¶ 27).

The above representations allegedly concerned material facts since PLAINTIFFS would not have pursued and obtained loans from either the profit sharing plan or the pension plan had they known that DEFENDANTS' intent was to reduce the sum owed by PLAINTIFFS as quickly as possible without regard to whether PLAINTIFFS survived the economic crisis they were experiencing. The above representations by DEFENDANTS were allegedly relied on by PLAINTIFFS to their damage. (Petition, ¶ 28).

The following agreements and authorities are submitted in support of the Motion to Dismiss.

III. ARGUMENT AND AUTHORITIES

A. The Allegations of the Petition Are To Be Taken as True.

The FDIC and NCNB have moved to dismiss this action because the Petition fails to state a claim upon which relief may be granted. In considering the Motion, the allegations of the Petition must be accepted as true by the Court. *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969). The issue is then whether the Petition states a claim which entitles PLAINTIFFS to relief against the FDIC and NCNB. *Ward v. Hudnell*, 366 F.2d 247, 249 (5th Cir. 1966). The factual contentions of the Petition, even if accepted at face value, are insufficient to establish that PLAINTIFFS are entitled to any relief from the FDIC or NCNB because PLAINTIFFS' claims are barred by the *D'Oench; Duhme* doctrine.

B. The "Special Defenses" of the FDIC.

In *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426 (1986), the United States Supreme Court, in considering whether the FDIC as receiver for Penn Square Bank had to honor a letter of credit, forcefully described the important public policy of providing special protection for the FDIC. "When Congress

created the FDIC, the Nation was in the throes of an extraordinary financial crisis." *Id.* at 432. Congress intended to provide a vehicle to "safeguard the hard earnings of individuals against the possibility that bank failures would deprive them of their savings." *Id.* Further, the legislation was intended "[to ensure that] the community is saved from the shock of bank failure and every citizen has been given an opportunity to withdraw his deposits . . . ." *Id.* at 433. The Court reviewed the comments made during the Congressional debate concerning the overriding need to protect the assets of failed banks, and noted that such concerns and comments "remain the best indication of Congress' underlying purpose in creating deposit insurance." *Id.* at 433-434. The Court then summarized:

> Congress' focus in providing for a system of deposit insurance — a system that has been continued to the present without modification to the basic definition of deposits that are "money or its equivalent" — was clearly a focus upon safeguarding the assets and "hard earnings" that businesses and individuals have entrusted to banks. Congress wanted to ensure that someone who put tangible assets into a bank could always get those assets back. The purpose behind the insurance of deposits in general, and especially in the section defining deposits as "money or its equivalent," therefore, is the protection of assets and hard earnings entrusted to a bank.

Id. at 435.

In recognition of these purposes and "the important governmental functions it performs," the federal courts, including the Fifth Circuit, have consistently and carefully safeguarded the FDIC from various types of claims by bank creditors and customers which would impair the FDIC's ability to perform its Congressionally mandated tasks. *Rau-*

scher Pierce Refsnes, Inc. v. FDIC, 789 F. 2d 313, 315 (5th Cir. 1986). These "special defenses" will defeat claims against an insolvent bank which would otherwise be valid but for the fact that the FDIC had been appointed as receiver. These additional protections have been afforded by the courts because of the FDIC's unique role in insuring the safety of the nation's banking system. *Id.*

The origin of the FDIC's special defenses is found in the Supreme Court's opinion in *D'Oench, Duhme.* In that case, the FDIC sued to collect a note of a borrower payable to a failed bank. The receipt issued for the note by the bank contained the statement "[t]his note is given with the understanding it will not be called for payment." *Id.* at 454. The FDIC had no knowledge of the receipt until after it had made demand for payment. The borrower asserted as a defense that the note was without consideration, was given "with the understanding no suit would be brought thereon; and that respondent was not a holder in due course." *Id.* at 456. The Court held that the borrower's assertion of these defenses against the FDIC was barred as a matter of public policy. To reach this conclusion, the Court interpreted § 12B(s) of the Federal Reserve Act, 12 U.S.C. § 264(s), to "reveal a federal policy to protect [the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the bank which [the FDIC] insures or to which it makes loans." *Id.* at 457.

The Court further enunciated the policy reasons for this conclusion stating:

> Furthermore, the fact that creditors may not have been deceived or specifically injured is irrelevant. . . . It is the "evil tendency" of the acts to contravene the policy governing banking transactions which lies at the root of the rule.

> Those principles are applicable here because of the federal policy evidenced in this Act to protect respondent, a federal corporation, from misrepresentations made to induce or influence the action of respondent, including misstatements at to the genuineness or integrity of securities in the portfolios of banks which it insures or to which it makes loans.

(Citations omitted.) *Id.* at 459. Finally, the Court concluded:

> Though petitioner was not a participant in this particular transaction and, so far as appears, was ignorant of it, nevertheless it was responsible for the creation of the false status of the note in the hands of the bank. It therefore cannot be heard to assert that the federal policy to protect respondent against such fraudulent practices should not bar its defense to the note . . . *If the secret agreement were allowed as a defense in this case the maker of the note would be enabled to defeat the purpose of the statute by taking advantage of an undisclosed and fraudulent arrangement which the statute condemns and which the maker of the note made possible.*

Id. at 461 (emphasis added).

The essence of *D'Oench, Duhme* is that a borrower may not assert a claim or defense against the FDIC which is based upon a secret side agreement[4] he had with the bank because he has, no matter how innocently, lent himself to a scheme which would deceive the banking authorities. "It is the 'evil tendency' of the acts to contravene the policy governing banking transactions which lies at the root of the rule." *Id.* at

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[4] As *D'Oench, Duhme* makes clear, the "secret agreement" need not truly be secret. Rather, if the agreement is not *properly* documented in the bank's files it is "secret" as to the FDIC.

459. *D'Oench, Duhme* has consistently been followed and expanded by the federal courts.

Moreover, "following the Supreme Court's creation of federal common law protections for the FDIC against secret side agreements in *D'Oench, Duhme,* Congress itself recognized the importance of such protections." *FDIC v. Castle,* 781 F. 2d 1101, 1106 (5th Cir. 1986). Accordingly, Congress enacted 12 U.S.C. § 1823(e), which provides:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

Section 1823(e) has recently been the subject of extensive review by the Supreme Court in *Langley v. FDIC,* U.S. , 108 S. Ct. 396 (1987), a case which also has significant implications for *D'Oench, Duhme* analysis. In *Langley,* the borrowers purchased land by obtaining a loan from the bank and executing a note, collateral mortgage, and personal guarantees. The bank sued on the note. In both a separate suit and also as a defense to the bank's suit, the borrowers asserted that "the notes had been procured by the bank's misrepresentations that the property" consisted of more acres than it actually contained and that it had less mineral acres than represented. *Id.* at 400. "No reference to these

representations appears in the documents executed by the Langleys, in the bank's records, or in the minutes of the bank's board of directors or loan committee." *Id.* The bank thereafter failed and the FDIC intervened in the suits. In considering the purpose of § 1823(e), the Court concluded that bank examiners must be able "to rely on a bank's records in evaluating the worth of the bank's assets," especially when evaluations relating to liquidating a failed bank must be made "with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services." *Id.* at 401.

Applying § 1823(e) and these policy concerns to the facts to determine the meaning of the word "agreement" in § 1823(e), the Court drew upon its earlier analysis in *D'Oench, Duhme:*

> We can safely assume that Congress did not mean "agreement" in § 1823(e) to be interpreted so much more narrowly than its permissible meaning as to disserve the principle of the leading case applying that term to FDIC-acquired notes. Certainly, *one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities,* whether the condition consists of performance of a counterpromise (as in *D'Oench, Duhme*) or of the truthfulness of a warranted fact.

Id. at 402 (emphasis added).

The Court also rejected the argument that the word "agreement" did not include a fraudulent misrepresentation: "[n]o conceivable reading of the word 'agreement' in § 1823(e) could cause it to cover a representation or warranty that is bona fide but to exclude one that is fraudulent."

Id.[5] Harsh as the result may be, the Court was stringent in interpreting the statute: "[p]etitioners are really urging us to engraft an equitable exception upon the plain terms of the statute. Even if we had the power to do so, *the equities petitioners invoke are not the equities the statute regards as predominant.*" *Id.* (emphasis added). The Court again focused on the policy of protecting the FDIC as the basis for its interpretation:

> While the borrower who has relied upon an erroneous or even fraudulent unrecorded representation has some claim to consideration, so do those who are harmed by his failure to protect himself by assuring that his agreement is approved and recorded in accordance with the statute.

Id. at 403 (citations omitted).

Thus, unwritten warranties or oral preconditions to a contract are not binding on the FDIC because they thwart the policies of full disclosure which protect the banking system and its creditors. In *Langley* the Supreme Court further noted that the essence of the borrower's claims were:

> that the bank made certain warranties regarding the land, the truthfulness of which was a condition to performance of their obligation to repay the loan. See 1A Corbin, Corbin on Contracts § 14, p. 31 (2d ed. 1963) ("truth [of the warranty] is a condition precedent to the duty of the other party"); .... Quite obviously, the parties' bargain cannot be reflected without including the

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[5] The Court also rejected the argument that the FDIC's knowledge of the alleged misrepresentation prior to the date of the bank failure was determinative. "Harm to the FDIC (and those who rely upon the solvency of its fund) is not avoided by knowledge at the time of acquiring the note." *Id.* at 403.

> conditions upon their performance, one of the two principal elements of which contracts are constructed.

Id. at 401. Similarly, claims of fraud in the inducement must also fail, where such claims are based upon allegations of unwritten "conditions" to agreements.

> Petitioners' fall-back position is that even if a misrepresentation concerning an existing fact can sometimes constitute an agreement . . . it at least does not do so when the misrepresentation was fraudulent and the FDIC had knowledge of the asserted defense at the time it acquired the note. We conclude, however, that neither fraud in the inducement nor knowledge by the FDIC is relevant to the section's application.

Id. at 402.

In *Langley,* the Court concluded that fraudulent misrepresentations were on the same footing as unwritten side agreements for purposes of the FDIC's defenses. Thus, fraud in the inducement, based upon a bank's oral promise, is barred as a defense against the FDIC because the "promise would be a side agreement to which Section 1823(e) would apply." *FDIC v. O'Neil,* 809 F. 2d 350, 354 (7th Cir. 1987).

Of course, *Langley* primarily involved the interpretation of 12 U.S.C. § 1823(e). Statutorily, the provision extends to the FDIC when it acts in its corporate capacity, whereas in this action, the FDIC is acting as receiver. However, it is clear that the important policy concerns found determinative in *Langley* apply equally to the policies and protections provided to the FDIC as receiver under *D'Oench, Duhme.* In *Langley* the Court relied upon its analysis in *D'Oench, Duhme* to "interpret" § 1823(e). 108 S.Ct at 401-02. As set forth in the discussion above, the policy concerns of protecting the banking system and innocent depositors and creditors underpinning *D'Oench, Duhme* are similar and complimentary to

those supporting the enactment of 12 U.S.C. § 1823(e). The principles set forth in *Langley* should apply equally to the FDIC in its capacity as receiver because of the same compelling public policy: the need to protect the banking system against undocumented side agreements.

The Fifth Circuit has also held that, when the FDIC acts as receiver, the protections of *D'Oench, Duhme* apply to it and the result will be the same as if § 1823(e) applied directly. *FDIC v. McClanahan*, 795 F. 2d 512, 516 (5th Cir. 1986). Moreover, the application of the principles of *Langley* to the FDIC as receiver can be derived by analogy from the recent decision in *FSLIC v. Murray*, 853 F. 2d 1251 (5th Cir. 1988). There several individuals formed a partnership to acquire real estate. They borrowed $3,600,000 to finance the property and in doing so, they signed bank notes. When the institution failed, the Federal Savings and Loan Insurance Corporation ("FSLIC") sued on the note. The individuals alleged that (1) the institution had falsely represented that they would have no personal liability on the notes, (2) had falsely represented the value of the property and (3) the institution had fraudulently and materially altered the notes after they had been signed. *Id.* at 1253. The Fifth Circuit applied *D'Oench, Duhme*,[6] stating that the borrowers "rather than the FDIC or the innocent depositors or creditors of the failed bank, must bear the consequences of [their] unfortunate involvement. . . ." *Id.* at 1255. Significantly, the Court then

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[6] The court stated that the important federal policy of *D'Oench, Duhme* protects FSLIC as well as FDIC. *Id.* at 1254. Since § 1823(e) does not apply by its terms to FSLIC, it is clear that the Fifth Circuit has accepted the position of the continued vitality of the federal common law policy, independent of § 1823(e), to protect the assets of a failed financial institution for the benefit of innocent depositors and innocent creditors against those who have lent themselves to an undocumented scheme or side agreement.

applied the reasoning of *Langley* to this *D'Oench, Duhme* case. The Fifth Circuit reasoned that in *Langley* the Supreme Court "compared alleged misrepresentations to D'Oench's invalid secret agreement." *Id.* at 1255. The Fifth Circuit then quoted with approval the following language from *Langley*:

> Certainly, one who signs a facially unqualified note subject to an unwritten and unrecorded condition . . . has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counter promise (as in *D'Oench, Duhme*) *or of the truthfulness* of a warranted fact."

Id. (emphasis added, citation omitted). Thus, the Fifth Circuit has clearly adopted the position that the principles of *Langley* apply to those situations governed only by the federal common law of *D'Oench, Duhme*. Since these principles have been applied to FSLIC, they would also apply to the FDIC as receiver, since both enjoy *D'Oench, Duhme* protection.[7]

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[7] The Fifth Circuit in *Murray* also concluded that the principles of certain cases decided under § 1823(e), which bar assertions of many individual defenses, also apply in a *D'Oench, Duhme* situation. The Court specifically cited FDIC v. Leach, 772 F. 2d 1262 (6th Cir. 1985) (failure of consideration not available against FDIC); FDIC v. Gulf Life Ins. Co., 737 F. 2d 1513 (11th Cir. 1984) (waiver, estoppel and unjust enrichment defense not available against FDIC); Gunter v. Hutcheson, 674 F. 2d 862 (11th Cir. 1982) (fraud defense not available against FDIC); FDIC v. Ohlson, 659 F. Supp. 490 (N.D. Iowa 1987) (mental incapacity defense not available against FDIC) as examples of defenses which were barred under its analysis. *Murray*, 853 F. 2d at 1256. Clearly, *D'Oench, Duhme* sweeps broadly in protecting the FDIC. Moreover, the holdings of the courts interpreting § 1823(e) are likewise applicable in interpreting *D'Oench, Duhme* in the light of *Langley* and *Murray*.

C. D'Oench, Duhme is Uniformly Followed in the Fifth Circuit.

The principles espoused in *D'Oench, Duhme* and *Langley* have been accepted wholeheartedly in this Circuit. For example, in *FDIC v. McClanahan, supra*, a farmer sought a $31,000 loan for a tractor from a dishonest bank officer who persuaded the farmer to sign a blank note. Despite the fact that the farmer later financed the tractor through another bank, the bank officer completed the note for $62,500 and appropriated the money himself. The farmer never received anything from this "loan." When McClanahan, the farmer, received notice of demand, he contacted his banker who told him not to worry, that he would take care of the matter. The banker then forged the farmer's signature to a renewal note for $82,000 and took the extra money also. *Id.* at 516-17. When the bank failed, the FDIC, as receiver, sued McClanahan on the original note. As a defense, McClanahan alleged failure of consideration and fraudulent inducement. *Id.* at 514. In rejecting these defenses, the Fifth Circuit strictly applied *D'Oench, Duhme.* McClanahan had, by signing the blank note, "lent himself to a scheme or arrangement whereby the [appropriate] banking authority . . . was or was likely to be misled." *Id.* at 517 (quoting *D'Oench, Duhme*).

The Court stressed the policy of protecting the innocent depositors and creditors of the failed bank as a basis for its holding:

> When the FDIC sues in its corporate capacity, a failure to recover from the defendant causes a loss to the FDIC itself; *when the FDIC sues as receiver, victory for the defendant will ordinarily mean a loss that is borne or shared by the uninsured creditors or depositors of the failed bank.* We are persuaded that Henry McClanahan, rather than the FDIC or the innocent depositors or

> ceditors of the failed bank, must bear the consequences of his unfortunate involvement with Orrin Shaid.

Id. at 516 (emphasis added).

The Fifth Circuit has consistently held that it is irrelevant that the borrower did not knowingly participate in the fraud, and it is likewise irrelevant that the borrower may not have actually had dealings with the failed bank. In *Chatham Ventures, Inc. v. FDIC,* 651 F. 2d 355 (5th Cir. 1981), *cert. denied,* 456 U.S. 972 (1982) the borrowers executed a real estate note, documented as an acquisition and development loan. The loan was then transferred from the original bank to a second institution. The second bank failed and the FDIC sued the borrowers on the note. The borrowers claimed that the written agreement was only a part of a larger joint venture agreement, breached by the original bank, wherein the bank was to loan additional funds. In defense it was further alleged that the borrowers had no direct dealing with the second bank, thus there was no "agreement" with that bank and they only had innocent motives with no intent to deceive. The Court held that § 1823(e) nevertheless barred these assertions. First, the Court held that the FDIC could invoke § 1823(e) regardless of which bank the borrowers dealt with because the statute made no exception "for agreements initiated by a third party and the obligors." *Id.* at 360-361. The Court also rejected the borrowers' assertion of no intent to deceive, applying the reasoning of *D'Oench, Duhme*:

> The statute, by its terms does not require that the obligor lend himself to a deceptive scheme in the sense of participating with culpability in a fraud. The statute and the cases only require that the obligor lend himself "to a scheme or arrangement whereby the banking authority on which the FDIC relied . . . was or was likely to be misled." *Of course if the obligors may assert oral side*

> *agreements reducing the value of the assets formerly held by the bank*, then the FDIC would be misled.

Id. at 361 (emphasis added, citations omitted). *See FDIC v. Cardinal Oil Well Serv. Co.*, 837 F. 2d 1369, 1372 (5th Cir. 1988) (reaffirming that *D'Oench, Duhme* prevents the assertion of such misrepresentations or side agreements as defenses against the FDIC).

D. D'Oench, Duhme Applies to Affirmative Claims as Well as Defenses.

The policies espoused in *D'Oench, Duhme* and in *Langley* apply to *all* assertions based upon unwritten side agreements, regardless of whether they are raised as defenses or as affirmative claims for damages against the FDIC. The rationale behind this rule is that the policies of requiring full disclosure of agreements to the banking authorities and of protecting the banks' other creditors, as espoused in both *D'Oench, Duhme* and *Langley,* would be eviscerated if they applied only to defenses against the FDIC, and not to affirmative claims for damages against the FDIC. *Langley* clearly establishes this principle. It involved two separate suits, later consolidated, asserting an affirmative claim for $5,000,000 against the FDIC and a defense against the FDIC's claims based upon fraudulent misrepresentations. The Court found both contentions untenable. *Langley,* U.S. at , 108 S. Ct. at 400.

Such restrictions on the policies underlying *D'Oench, Duhme* and Section 1823(e) were specifically disapproved in *Beighley v. FDIC,* 676 F. Supp. 130, 132 (N.D. Tex. 1987, Woodward, J.), *appeal docketed,* No. 88-1257 (5th Cir. April 13, 1988):

> To contend, as plaintiffs do, that [the *D'Oench, Duhme* doctrine] is not applicable to their affirmative claims

> against the FDIC is, while technically defensible, to misunderstand *Langley's* import. To allow a claim *against* the FDIC asserting the very grounds that could not be used as a defense to a claim *by* the FDIC is to let technicality stand in the way of principle. Moreover, the effect of such an approach would be to reduce actions Congress has allowed the FDIC to pursue to nullities since defendants could counterclaim and recover what they lost.
>
> One purpose of [the doctrine] is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets. Allowing plaintiffs' affirmative claim in the face of [that doctrine] would undermine that purpose.

Id. at 132 (citations omitted, emphasis retained.)

Similarly, in *FDIC v. Huston,* 1988 W.L. 97621 (N.D. Tex. Aug. 22, 1988, Robinson, J.), it was held that the policies underlying *D'Oench, Duhme* preclude both defenses and affirmative claims based upon alleged side agreements. In *Huston,* the Court discussed *FDIC v. Chessen,* 1986 W.L. 15638 (D. Kan. Oct. 2, 1986), wherein notes were signed pursuant to an understanding that the borrower would not be personally liable on the notes and that the notes would be "rolled over". The borrower later asserted usury as a defense against the FDIC as receiver. The Court, however, held that *D'Oench, Duhme* prohibits a person who lends himself to a scheme that would tend to mislead banking authorities from asserting claims against the FDIC as receiver arising out of the deceptive scheme. *Id.*

The court in *Houston,* in discussing *Chessen,* stated:

> This Court agrees with that rationale. A defendant cannot benefit from his own wrongful actions. Here Defendant Rex Huston agreed to enter into a scheme that

> could deceive the bank examiners . . . and now he requests damages arising from his participation in that scheme.
>
> Therefore the Court finds that under the general policy of protecting the FDIC from secret agreements so that it may rely on bank records in appraising the worth and collectibility of the bank's assets, the Defendant cannot assert his [claims] against the FDIC in either [its corporate] capacity [or its capacity as Receiver].

Id., slip op. at 17-18. A similar result is mandated in this case.

E. Claims Barred By D'Oench, Duhme As To FDIC Are Equally Barred As To NCNB.

Affirmative defenses, claims, and counterclaims barred as to the FDIC under the doctrine of *D'Oench, Duhme* are equally barred as to NCNB, an entity taking the assets from the FDIC and owned by the FDIC. *FSLIC v. Murray*, 853 F.2d at 1256 (subsequent holder of note takes free of defenses); *FDIC v. Cremona Co.*, 832 F.2d 959, 964 (6th Cir. 1987), *cert. dism'd sub. nom., Gonda v. FDIC*, U.S. , 108 S. Ct. 1494 (1988) (subsequent holder of note not subject to side agreement provisions limiting liability on note); *RSR Properties, Inc. v. FDIC*, No. MO-88-CA-200, slip op. at 16 (W.D. Tex. Jan. 18, 1989)[8] (claims "barred as to FDIC are equally barred as to NCNB. . . ."); *FDIC v. Wisenbaker*, No. MD-88-CA-109, slip. op. at 14 (W.D. Tex. Oct. 26, 1988)[9] ("since the FDIC enjoys the status of a holder in due course, NCNB Texas could also acquire the same status. . . .").

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[8] A copy of this decision is attached hereto as Exhibit "A" for the convenience of the Court.

[9] A copy of this decision is attached hereto as Exhibit "B" for the convenience of the Court.

In the instant case, any of the defenses available to the FDIC under *D'Oench, Duhme* and related cases are likewise available to NCNB. Accordingly, all relief granted to the FDIC should be granted to NCNB.

F. The Petition Should Be Dismissed for Failure to State a Claim Pursuant to D'Oench, Duhme.

Based upon the foregoing legal analysis, when the law is applied to the facts as alleged in the Petition, all of PLAINTIFFS' claims asserted against the FDIC and NCNB must be dismissed. PLAINTIFFS' causes of action are based on allegations of fraud in the inducement on the part of DEFENDANTS and/or the existence of an unwritten and an unrecorded side agreement between PLAINTIFFS and DEFENDANTS. (Petition, ¶¶ 25-28). Those claims are barred under *D'Oench, Duhme* and its progeny.

DEFENDANTS allegedly made fraudulent representations to induce PLAINTIFFS to obtain loans from their profit sharing and pension plans so that DEFENDANTS could reduce the outstanding balance owed by PLAINTIFFS (Petition, ¶ 27) as quickly as possible without regard to whether PLAINTIFFS survived the economic crises they were experiencing. (Petition, ¶ 28). The alleged fraudulent misrepresentations and the alleged oral agreement to honor overdrafts are the classic undocumented secret collateral/side agreements prohibited by *D'Oench, Duhme*, 315 U.S. at 461 and *Langley*, U.S. at , 108 S. Ct. at 402.

With respect to the alleged letter agreements (both the original and modified versions) to use PLAINTIFFS' profit and pension plan funds to pay off outstanding debts, neither meet the requirements of 12 U.S.C. § 1823(e) (Supp. 1988). Even assuming that the alleged letter agreements were in writing, there is no allegation by PLAINTIFFS that any of the other requirements of § 1823(e) were met. When *all* of the

§ 1823(e) requirements are not met, the agreement is invalid. *See In re CTS Truss, Inc.*, 859 F. 2d 357, 361 n.7 (5th Cir. 1988) (agreement invalid where it failed to meet § 1823(e) requirements); *FDIC v. Jesus Valez*, 678 F. 2d 371, 375 (1st Cir. 1982) (where letter agreement was not approved by bank board of directors nor kept as bank's official records, agreement invalid under § 1823(e)); *FDIC v. Midland Drilling Co.*, No. 87-1598, slip op. at 8, 10 (5th Cir. Aug. 19, 1988)[10] (agreements to restructure loans invalid against FDIC since they did not meet § 1823(e)).

Since PLAINTIFFS have lent themselves to a "scheme" which would tend to deceive the banking authorities, they should suffer the results and consequences of their involvement, not the FDIC, NCNB, and the innocent creditors and depositors. *McClanahan*, 795 F. 2d at 516.

PLAINTIFFS' allegations accepted as true fail to state a claim upon which relief may be granted by this Court under *D'Oench, Duhme, Langley,* and *McClanahan*. This action should be dismissed pursuant to FED. R. CIV. P. 12(b)(6).

G. The Petition Should be Dismissed to the Extent That It Seeks Exemplary Damages.

The Petition seeks recovery of exemplary damages for the alleged wrongful and bad faith conduct of DEFENDANTS. However, exemplary damages are not recoverable against the FDIC as receiver. *Professional Asset Management v. Penn Square Bank, N.A.*, 566 F. Supp. 134 (W.D. Okla. 1983). In that case, the Court reasoned that an award of exemplary damages against the receiver would not punish the bank, but instead would only punish its innocent creditors and uninsured depositors whom the FDIC was representing. *Id.* at 136-137.

[10] A copy of this decision is attached hereto as Exhibit "C" for the convenience of the Court.

See Anderson v. Hershey, 127 F. 2d 884, 887 (6th Cir. 1942) ("punitive double penalty" does not apply to receiver; an award would adversely "affect creditors and depositors who were in no way connected with or responsible for" the alleged bad conduct); *FDIC v. National Union Fire Ins. Co. of Pittsburgh, Pa.,* 630 F. Supp. 1149, 1156 n.4 (W.D. La. 1986) (court stated that "FDIC does not simply stand in shoes of its predecessor bank" and that "an award of punitive damages against the receiver would not punish the bank, but its innocent creditors and uninsured depositors" (quoting *Professional Asset Management,* 566 F. Supp. at 136-37)); *Summers v. FDIC,* 592 F. Supp. 1240 (W.D. Okla. 1984) (treble damages are not recoverable against the FDIC in a RICO suit, 18 U.S.C. § 1964(c) (1984)). *See, generally, FDIC v. Soden,* 603 F. Supp. 629, 633 (D. Ka. 1984) (FDIC not subject to treble damages under Bank Holding Company Act provisions); *FDIC v. Tito Castro Construction, Inc.,* 548 F. Supp. 1224, 1226 (D. Puerto Rico 1982) (FDIC not subject to punitive provisions of usury statute).

Likewise, exemplary damages would not be recoverable against NCNB under the rationale of *Wisenbaker* and *RSR Properties.* To allow such an award would only increase the cost of the failure of REPUBLIC to the FDIC, thereby imposing such costs indirectly on the FDIC. Again, such is improper since an award would not punish the wrongdoer, but only innocent depositors, creditors, and the permanent insurance fund.

The Petition should be dismissed to the extent it seeks recovery of exemplary damages because it fails to state a claim upon which relief may be granted. FED. R. CIV. P. 12(b)(6).

H. The Petition Should Be Dismissed to the Extent That It Seeks Attorney's Fees.

The Petition also seeks recovery of attorneys' fees. Attorneys' fees, unless provided for in a written agreement, are not recoverable in an action against the FDIC. *InterFirst Bank Abilene, N.A. v. FDIC*, 777 F. 2d 1092, 1097 (5th Cir. 1985) ("[W]here recovery of attorneys' fees is not specified in the parties' contract or where there is no collateral fund from which they can be recovered, a claim for attorneys' fees cannot be asserted against the assets of a failed bank."). The same result should apply with respect to NCNB. *RSR Properties, Inc.* slip. op. at 16; *Wisenbaker*, slip. op. at 14.

In the instant case, there is no written agreement that provides for attorneys' fees. Consequently, the Petition should be dismissed to the extent it seeks recovery of attorneys' fees because it fails to state a claim upon which relief may be granted. FED. R. CIV. P. 12(b)(6).

I. Claims Against Individual Defendant Should Also Be Dismissed.

The Petition includes allegations against Defendant JOBE, at all times material herein the president of the failed REPUBLIC. JOBE has not filed or joined in this Motion. However, it is clear that no cause of action upon which relief can be granted has been stated against JOBE. In order to finally dispose of this entire matter, it is appropriate that the Court, on its own Motion, dismiss this suit as to JOBE pursuant to FED. R. CIV. P. 12(b)(6). *Shawnee Int'l, N.V. v. Hondo Drilling Co.*, 742 F. 2d 234, 236 (5th Cir. 1984) ("a district court may dismiss a complaint on its owns motion for failure to state a claim"). The Petition makes no allegation that any of JOBE's alleged acts or representations were made outside the scope of his employment as president of REPUBLIC. Such a showing is required to proceed against a corporate officer in his individual capacity. *RSR Properties*, slip. op. at 20

(claims against officers of failed RepublicBank barred where officers did not act outside scope of their employment); *Talmadge Tinsley Co. v. Kerr*, 541 S.W.2d 207, 209 (Tex. Civ. App. — Dallas 1976, writ ref'd n.r.e.).

Accordingly, since PLAINTIFFS make no allegation against JOBE that any of his acts or representations were made outside the scope of his employment as president of the failed REPUBLIC, the action against JOBE should be dismissed on the Court's own Motion.

IV. CONCLUSION

The Petition should be dismissed for failure to state a claim upon which relief may be granted pursuant to the *D'Oench, Duhme* doctrine. Further, the Petition should be dismissed for failure to state a claim upon which relief may be granted to the extent exemplary damages and attorneys' fees are sought. Finally, the Petition should be dismissed against JOBE since his acts or representations were not made outside the scope of his employment.

WHEREFORE, the FDIC and NCNB pray that their Motion to Dismiss be granted and that they have such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

BAKER, MILLS & GLAST, P.C.

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ORIGINALLY SIGNED BY
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief In Support of Motion to Dismiss was served upon Joseph E. Ashmore, Jr., Esq., Vassallo & Ashmore, P.C., 3710 Rawlins, Suite 1200, Dallas, Texas 75219, Counsel for Plaintiffs, by depositing the same in the United States mail, proper postage prepaid, certified and return receipt requested, on this 2nd day of February, 1989.

Originally Signed by
William Frank Carroll

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BELL & MURPHY AND ASSOCIATES, INC., JOHN W. BELL, JR., HAROLD D. BARNETT, ROBERT D. HAMER, JR. and RICHARD L. MEARS *Plaintiffs,* vs. CHARLES E. JOBE AND FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR FIRST REPUBLICBANK DALLAS, N.A., (F/K/A FIRST REPUBLICBANK GATEWAY, N.A.) and NCNB TEXAS NATIONAL BANK, N.A. *Defendants.*	CIVIL ACTION NO. CA 4-88-553-E

BRIEF IN RESPONSE OF MOTION TO DISMISS

COMES NOW, BELL AND MURPHY AND ASSOCIATES, INC., JOHN W. BELL, JR., HAROLD D. BARNETT, ROBERT D. HAMER, JR., and RICHARD L. MEARS, Plaintiffs in the above-styled and numbered cause, and present this Response to Defendants', FEDERAL DEPOSIT INSURANCE CORPORATION (FDIC) and NCNB TEXAS NATIONAL BANK (NCNB), Motion To Dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), and would show the Court the following.

I.

STATEMENT OF THE CASE

Movants' statement of the case is substantially correct.

II.

STATEMENT OF FACTS

Movants have substantially and correctly stated the facts and allegations which form the basis of their Motion.

III.

OVERVIEW OF PLAINTIFFS' RESPONSE

Plaintiffs' Response can be summarized as follows: Movants have misconstrued Plaintiffs' cause of action and misapplied the law as set out in their Brief. Plaintiffs will make this argument in several steps, the first of which appears below.

IV.

NONE OF THE CASES OR STATUTES CITED BY MOVANTS ARE APPLICABLE TO THE FACTS AND THE CAUSE OF ACTION STATED UNDER THOSE FACTS

There is one case which provides the foundation for Movants' arguments, namely *D'Oench, Duhme, and Company v. FDIC*, 315 U.S. 447(1942). That case is distinguishable on its facts from the case at bar. In *D'Oench, Duhme*, the FDIC sued on a note issued by a failed bank. The Defendant raised as a defense the receipt given to him by the bank which stated that the Defendant was under no obligation to pay the note. The Supreme Court ruled that the defense was not applicable due to the policies behind the purpose of the FDIC. Please note that the case at bar does not involve a suit

on a note in any way. More significantly, the Plaintiffs *are not* claiming that they do not have to pay any loans or notes outstanding to Movants. The significance of this fact will become very apparent in the discussion below.

There is another basis for the Movants' arguments which is just as significant as *D'Oench, Duhme*. That basis is 12 U.S.C. § 1823(e). As stated by Movants in their Brief, this statute was a codification of the common law rule of *D'Oench, Duhme.*

An examination of the opening lines of the statute show that it is inapplicable to the case at bar. The statute provides that:

> No agreement which tends to diminish or defeat the right, title or interest of the corporation in any asset acquired by it under this section . . . 12 U.S.C. § 1823(e).

The above passage shows that on its face, the statute applies *only* to agreements which attempt "to dilute the collectability of an asset" of a failed bank. Kelly, Bruning, Whitley, and Norton, "Overview of the Role of the FDIC as Receiver and Liquidator," SMU Bankruptcy Law Institute, Page 18-25, citing *FDIC v. de Jesus Velez*, 678 F.2d 371, 375 (1st Cir. 1982). The Court should also note that since § 1823(e) is a direct codification of the *D'Oench, Duhme* rule, it follows that *D'Oench, Duhme* also applies only to agreements which tend to "dilute the collectability of an asset" of a failed bank. In other words, both *D'Oench, Duhme* and § 1823(e) apply only in situations in which unrecorded agreements could defeat the FDIC's claim against assets of the failed bank.

It is vital to understand that the agreements involved in the case at bar have absolutely nothing to do with the collectability of an asset of a failed bank. As stated above, the Plaintiffs are not claiming that they have no obligation to pay Movants for any outstanding loans. Hence, § 1823(e) — as

well as *D'Oench, Duhme* — have absolutely no bearing on the issues before the Court. Thus, all cases cited by Movants which are based on *D'Oench, Duhme* and § 1823(e) are inapplicable. However, Plaintiffs will briefly show how the principal cases relied upon by Movants are distinguishable from the case at bar.

The first case to be examined is *Langley v. FDIC,* 108 S. Ct. 396(1987). In that case, the bank sued on a note. The defendants claimed misrepresentation as a defense to the bank's suit. The FDIC intervened as a party once the bank failed. The Supreme Court held that § 1823(e) clearly precluded such defendant's defense, because 1) the alleged representations, if allowed as a defense, would in effect defeat the FDIC's claim on the note, and 2) the alleged representations were not in the bank's written records. Given the language of the statute and the purposes behind the statute, the Supreme Court's decision was obviously correct. The Court further held that fraudulent misrepresentations were equivalent to secret side agreements which were explicitly prohibited under the statute.

Langley is not applicable for the simple reason that the Plantiffs here are not contesting the existence of obligations to the Movants. Furthermore, Plaintiffs are not claiming that the alleged fraud and misrepresentation in the case at bar in any way discharge the outstanding loans due to Movants.

FSLIC v. Murray, 853 F. 2d 1251 (5th Cir. 1988) is the next case to be examined. In that case, the FSLIC sued the defendants on a note. The defendants alleged fraud and misrepresentation as defenses to the suit. Again, such is not the situation here. In Plaintiff's cause of action has nothing to do with making a claim for a defense concerning any notes or loan obligations. Therefore, *Murray* is of no consequence.

FDIC v. McClanahan, 795 F.2d 512, 516 (5th Cir. 1986) is likewise irrelevant. In that case, McClanahan obtained a loan

from a bank. The bank committed blatant fraud in precuring this loan. Such fraud was not found anywhere in the bank records. The bank failed, and the FDIC took over as receiver. Subsequent to such action, the FDIC sued on the loan to McClanahan. McClanahan raised failure of consideration and fraud in the inducement as defenses. The Fifth Circuit correctly ruled that the principle of *D'Oench, Duhme* precluded these defenses for the same reasons that § 1823(e) precluded the defenses in *Langley*.

Another case to be mentioned is *Chatham Ventures, Inc. v. FDIC*, 651 F.2d 355 (5th Cir. 1981), *cert. denied*, 456 U.S. 972 (1982). The key factors to this case are 1) the FDIC sued defendants on a note, and 2) the defendants asserted as a defense agreements which were not in writing as part of the note itself. Once again, as with all the other cases cited above, the factual situation of the case at bar is different in that the case at bar does not concern a suit on a note.

An examination of the cases cited supra, reveals two significant factors. First, all of the cases concern a suit on a loan obligation or note and any claims or defenses that could prevent the collection by the FDIC of said loans or notes. Secondly, the cases and the Movants' discussion of those cases clearly shows that the principles of *D'Oench, Duhme* and § 1823(e) are one in the same and are applied uniformly regardless of which rule technically applies. These two factors along with the facts of this case produce a twofold conclusion:

1. *D'Oench, Duhme* and § 1823(e) apply only to cases which have as their cause of action the obligation to pay on a loan or note, and

2. Those legal principles have no application in this case because the cause of action here does not center around an obligation to pay a loan or note.

V.

NATURE OF PLAINTIFFS' CAUSE OF ACTION

The Plaintiffs' petition does not involve a cause of action on a note or a loan. Plaintiffs' petition and cause of action contend that the Defendant bank and Defendant Jobe fraudulently forced Plaintiffs to relinquish control of their business to the Defendant bank, and subsequent to such action, the bank and Defendant Jobe mismanaged and misapplied the assets and operating capital of BELL AND MURPHY AND ASSOCIATES to such a degree that the business fail. Such mismanagement was conducted in direct contravention of agreements between the Plaintiffs and the Defendant bank and Defendant Jobe. In effect, Plaintiffs are alleging a cause of action in the nature of a breach of a fiduciary duty.

The Movants have misconstrued the Plaintiffs' cause of action. In order to try to make the facts of this case come within the purview of *D'Oench, Duhme* and § 1823(e), Movants have focused on the loans on the Plaintiffs' Pension and Profit Sharing Plans. According to Movants, all the agreements alleged in Plaintiffs' petition concerned the procurement and payment of these loans. Movants interpretation is simply incorrect. As stated above, the Plaintiffs' cause of action deals with mismanagement and misappropriation regarding the Plaintiffs' business funds. A closer look at the allegations of Plaintiff's will reflect that the agreements alleged therein do not in any way concern payment or nonpayment of the loans obtained against the Pension and Profit Sharing Plans. Hence, there is no way that the agreements could be construed to jeopardize any asset held by the Defendant Bank. Furthermore, the agreements enhanced the banks ability to secure payment on all outstanding loans by the Plaintiffs.

Also, Movant's argue that the letter agreements concerning overdrafts are "classic secret agreements" barred by *D'Oench, Duhme* and § 1823(e). The overdraft agreement had absolutely nothing to do with the collectability of an asset of the bank. In fact, it did not concern any loan or other asset of the Defendant Bank. It concerned an operating account of Plaintiffs' — that is, an asset of Plaintiffs', not the Defendant Bank. To put the issue in perspective, the letter agreements did not in any way jeopardize the Bank's ability to collect money owed to it by Plaintiffs. Furthermore, Plantiffs are not claiming the agreements relieve them of paying on the loans. Therefore, *D'Oench, Duhme* and § 1823(e) have no effect in the case at bar.

Ironically, Defendant Bank's and the Defendant Jobe's fraudulent actions and breach of the agreements seriously and adversely affected the collectability of the various loans, for such actions caused Plaintiffs' business, and hence their ability to pay, to fail.

VI.

MOVANTS' ARGUMENT AS TO AFFIRMATIVE CLAIMS IS INAPPLICABLE

Movants' argument as to affirmative claims against the FDIC is inapplicable for the simple reason that it is based entirely on *D'Oench, Duhme* and § 1823(e).

Two cases cited by Movants warrant further discussion. *Beighley v. FDIC*, 676 F. Supp. 130 (N.D. Tex. 1987) directly supports the Plaintiffs' position on this issue. As quoted in Movants' Brief, that case stated

> To allow a claim *against* the FDIC asserting the very grounds that could not be used as a defense to a claim *by* the FDIC is to let technicalities stand in the way of principle. *Id.* at 132 (emphasis retained).

In other words, *Beighley* holds that the only claims which are barred by *D'Oench, Duhme* and § 1823(e) are claims which involve issues identical to defenses that would be barred by those doctrines. Since no such issues are involved in the cause of action in the case at bar, the Movants' argument fails.

FDIC v. Huston, 1988 W.L. 97621 (N.D. Tex.) is the other case to be evaluated. Plaintiffs direct the Court to the second quoted paragraph from *Huston*, which appears on page 19 of Movants' Brief. That paragraph states that the purpose of prohibiting secret agreements is solely so that the FDIC may rely on the bank records in "appraising the *worth and collectability* of the bank's assets." This passage from *Huston* provides further proof for Plaintiffs' argument that *D'Oench, Duhme* and § 1823(e) are inapplicable to this case. It cannot be stressed enough or repeated enough that Plaintiffs are not claiming that they do not have to pay outstanding loans or notes. Since the whole purpose behind the "special affirmative defenses" of the FDIC is to insure that loans and notes issued by a bank (that is, its assets) may be collected, and since no such concerns are present in this case, all of Movants' arguments regarding no cause of action are incorrect.

VII.

PLAINTIFFS' CLAIMS ARE NOT BARRED AS TO NCNB

Since Movants' arguments under *D'Oench, Duhme* and § 1823(e) are of no meaning in this case, its follows that its argument that Plaintiffs' claims are barred as to NCNB are also of no meaning.

VIII.

MOVANTS CANNOT ASSERT RIGHTS OF DEFENDANT JOBE

On page 24 of their Brief, Movants assert that all complaints against Defendant Jobe should be dismissed. Movants also state that Defendant Jobe has not filed or joined in the Motion To Dismiss. It is clear that counsel for Movants is not representing Defendant Jobe. It is also clear and beyond question that Movants cannot in any way assert the rights of a third party. Therefore, this Court should not consider any requests by Movants that all claims against Defendant Jobe be dismissed.

IX.

CONCLUSION

The foregoing analysis shows that given 1) the purpose and meaning of *D'Oench, Duhme* and § 1823 (e), and 2) the nature of Plaintiffs' cause of action, the Motion To Dismiss should be denied. None of the cases or legal principles cited and argued by Movants can be applied to the facts in the case at bar. Therefore, Movants have presented absolutely no legal basis or authority whatsoever to justify dismissal of the Plaintiffs' cause of action. Consequently, Plaintiffs respectfully request that this Court deny in all aspects Movants' Motion to Dismiss For Failure To State a Claim.

Respectfully submitted,

LAW OFFICES OF
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief has been mailed certified, returned receipt requested to William Frank Carroll, counsel for Movants, 500 Trammell Crow Center, 2001 Ross Avenue, Dallas, Texas 75201-2916 on this 1st day of March, 1989.

JOSEPH E. ASHMORE, JR.

IN THE
United States District Court
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BELL & MURPHY AND ASSOCIATES, INC., JOHN W. BELL, JR., HAROLD D. BARNETT, ROBERT D. HAMER, JR. and RICHARD L. MEARS,
Plaintiffs,

v.

CHARLES E. JOBE AND FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR FIRST REPUBLICBANK DALLAS, N.A., (F/K/A/ FIRST REPUBLICBANK GATEWAY, N.A.) and NCNB TEXAS NATIONAL BANK,
Defendants.

CIVIL ACTION NO.
CA 4-88-553-E

REPLY TO PLAINTIFFS' BRIEF IN RESPONSE TO MOTION TO DISMISS

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS, CHARLES E. JOBE, FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR FIRST REPUBLICBANK DALLAS, N.A. (F/K/A FIRST REPUBLICBANK GATEWAY, N.A.) AND NCNB TEXAS

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REPLY TO PLAINTIFFS' BRIEF IN RESPONSE TO MOTION TO DISMISS

Defendants CHARLES E. JOBE ("JOBE"), FEDERAL DEPOSIT INSURANCE CORPORATION ("FDIC") as Receiver for FIRST REPUBLICBANK DALLAS, N.A. (f/k/a First RepublicBank Gateway, N.A.) ("REPUBLIC") and NCNB TEXAS NATIONAL BANK, N.A.'s ("NCNB") file this their Reply to PLAINTIFFS' Brief in Response to Motion to Dismiss and would respectfully show the Court the following:

I. STATEMENT OF THE CASE

This action was originally filed by PLAINTIFFS against REPUBLIC and JOBE. After the FDIC and NCNB intervened as party defendants,[1] on February 2, 1989 they filed their Motion to Dismiss and Brief in Support of Motion to Dismiss whereby they moved this Court, pursuant to FED. R. CIV. P. 12(b)(6) to dismiss Plaintiff's Original Petition (the "Petition") under the doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) for failure to state a claim upon which relief may be granted.

The FDIC and NCNB have further moved to dismiss those portions of the Petition, pursuant to FED. R. CIV. P. 12(b)(6), to the extent recovery of exemplary damages and attorneys' fees are sought because exemplary damages and attorneys' fees are not recoverable from the FDIC in its capacity as receiver of REPUBLIC nor from NCNB.

JOBE has filed his Motion to Join FDIC's and NCNB's Motion to Dismiss and Brief in Support of Motion to Dismiss (hereafter referred to as "Motion to Dismiss and Brief"). On March 1, 1989, PLAINTIFFS filed their Brief in Response to Motion to Dismiss (hereafter referred to as "Response").

II. ARGUMENT AND AUTHORITIES

The sum total of PLAINTIFFS' arguments[2] is based upon one common, but flawed, premise: since PLAINTIFFS' claims for relief allegedly do not center around their admitted

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[1] REPUBLIC, JOBE, FDIC, and NCNB are hereafter sometimes collectively referred to as "DEFENDANTS".

[2] In their Response, PLAINTIFFS do not address those portions of the Motion to Dismiss addressed to FDIC's and NCNB's liability for exemplary damages and attorneys' fees. Consequently, PLAINTIFFS have conceded that they are not entitled to attorneys' fees or exemplary damages.

obligations to pay on a note or loan, the special defenses available to DEFENDANTS do not apply in this case. (Response at p. 6).

PLAINTIFFS thus conclude, without relying upon nor citing any new authority to this Court, that since the side agreements upon which their claims for relief are based do not dilute the collectability of the assets of the failed REPUBLIC, the principles developed by *D'Oench, Duhme* and its progeny and 12 U.S.C. § 1823(e) (Supp. 1988) are inapplicable. PLAINTIFFS' arguments are simply, totally and completely wrong.

A. D'Oench, Duhme and § 1823(e) Apply to All Unrecorded Side Agreements.

PLAINTIFFS' sole focus is that because their claims of relief are not based on a "note or loan", the policies, principles, and applications of *D'Oench, Duhme* and § 1823(e) are aimed at the secret, unrecorded side agreements to a note or loan. PLAINTIFFS, while admitting their obligations to DEFENDANTS on outstanding notes and loans, are nevertheless suing DEFENDANTS on the basis of alleged side agreements entered into between themselves and DEFENDANTS to obtain funds to pay off the notes and loans, and are also suing DEFENDANTS for the alleged false representations made by DEFENDANTS to induce PLAINTIFFS to enter into these side agreements. (Petition, ¶ ¶ 19-28). In other words, the very purpose of the side agreements was to pay off PLAINTIFFS' loans, and would have never been made but for the obligation to pay off the loans.

PLAINTIFFS then allege (Response at p. 3) that these side agreements "have absolutely nothing to do with the collectability" of REPUBLIC's assets, i.e. the outstanding loans. While it may be arguable that the side agreements have anything to do with the *collectability* of PLAINTIFFS' outstanding loans, they most certainly dilute the *worth* of those

loans. It is a matter of simple accounting and arithmetic: if PLAINTIFFS recover damages based upon the side agreements, the recovered damages would be a direct offset against the value of the outstanding notes and loans.

Arguments similar to PLAINTIFFS' have been routinely rejected by the courts. In *FDIC v. Huston*, 1988 W.L. 97621 (N.D. Tex. Aug. 22, 1988, Robinson, J.)[3] Defendant Huston argued that since his affirmative defense and counterclaim were not based upon an agreement which tended to diminish the rights of the FDIC in a note and guaranties, they thus were not subject to dismissal under *D'Oench, Duhme* and § 1823(e). This Court rebuffed those claims, since "*any* agreement is subject to [§ 1823(e)] if it tends to defeat or diminish FDIC's rights in an asset . . . [and thus] any defense [or claim] which emanates from a party's secret agreement having the effect of misinforming the FDIC is barred. . . ." *Id.* at 10 (citations omitted, emphasis supplied). This Court further stated that to uphold Huston's arguments would be to defeat his underlying obligations since they "would effectively eviscerate any recovery the FDIC would have on the notes and guaranties." *Id.* at 15, n. 7.

The same rationale applies here. If PLAINTIFFS were permitted to proceed to recover on their unrecorded side agreements which allegedly "have absolutely nothing to do with the collectability" of their note and loan obligations, any such recovery, if successful, would offset and diminish the value of the assets of the failed REPUBLIC. Such a result is prohibited by the policies and principles of *D'Oench, Duhme* and § 1823(e) which apply to eliminate and bar recovery on *all* side agreements, including the side agreements allegedly entered into between PLAINTIFFS and DEFENDANTS.

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[3] A copy of this decision is attached hereto as Exhibit "A" for the convenience of the Court.

B. D'Oench, Duhme and § 1823(e) Apply to Affirmative Claims.

Similarly, PLAINTIFFS repeat their arguments (Response at 8-9) that since their side agreements are not involved with the collectability of REPUBLIC's assets, *D'Oench, Duhme* and § 1823(e) do not apply to their affirmative claims.

Again, PLAINTIFFS are simply missing the point. The basis of their argument is that because they are not asserting defenses to a note or that their claims do not arise from a note, they may nevertheless seek and recover damages which arise from unrecorded, secret side agreements which do not comply with the provisions of § 1823(e).

PLAINTIFFS misunderstand the import of the decisions cited in DEFENDANTS' Motion to Dismiss and Brief, which again apply to *all* assertions against the FDIC, be they raised as defenses or as affirmative claims. The rationale is that the result of an allowed defense or claim against the FDIC would be the same: it would lower the value *or* collectability of an asset of the failed institution. *See Beighley v. FDIC*, 676 F. Supp. 130, 132 (N.D. Tex. 1981, Woodward, J.), *appeal docketed*, No. 88-1257 (5th Cir. April 13, 1988).

PLAINTIFFS are attempting a classic "end run" around *D'Oench, Duhme* and § 1823(e). *See FDIC v. Lattimore Land Corp.*, 656 F.2d 139, 146 n. 13 (5th Cir. 1981); ("end run" prohibited); *RSR Properties, Inc. v. FDIC*, No. MO-88-CA-200 (W.D. Tex. Jan. 18, 1989) ("end run" prohibited). These cases and others cited in DEFENDANTS' Motion to Dismiss clearly demonstrate that *D'Oench, Duhme* and § 1823(e) defeat end run affirmative claims such as those urged by PLAINTIFFS.

III.

CONCLUSION

PLAINTIFFS have not cited one authority for their bold proposition that their causes of action based upon unrecorded secret side agreements should not be dismissed under the policies and principles of *D'Oench, Duhme* and § 1823(e). PLAINTIFFS have wholly failed to adequately distinguish any of the authorities cited by DEFENDANTS, nor have PLAINTIFFS advanced one legally recognized proposition that their claims for relief should not be dismissed. Accordingly, their arguments must fail.

WHEREFORE, Defendants JOBE, FDIC and NCNB pray that their Motion to Dismiss be granted and that they have such other and further relied to which they may show themselves justly entitled.

Respectfully submitted,

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RepublicBank Gateway, N.A.)
and NCNB TEXAS NATIONAL
BANK, N.A.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply to Brief in Response to Motion to Dismiss was served upon Joseph E. Ashmore, Jr., Esq., Vassallo & Ashmore, P.C., 3710 Rawlins, Suite 1200, Dallas, Texas 75219, Counsel for Plaintiffs, by depositing the same in the United States Mail, proper postage prepaid, certified and return receipt requested, on this 10 day of March, 1989.

Original Signed by
William Frank Carroll

WILLIAM FRANK CARROLL

IN THE
United States District Court
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BELL & MURPHY AND ASSOCIATES, INC., JOHN W. BELL, JR., HAROLD D. BARNETT, ROBERT D. HAMER, JR., and RICHARD L. MEARS, *Plaintiffs,* v. CHARLES E. JOBE AND FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR FIRST REPUBLICBANK DALLAS, N.A., (F/K/A/ FIRST REPUBLICBANK GATEWAY, N.A.) and NCNB TEXAS NATIONAL BANK, N.A. *Defendants.*	CIVIL ACTION NO. CA 4-88-553-E

PLAINTIFFS' RESPONSE TO DEFENDANTS' REPLY TO PLAINTIFFS' BRIEF IN RESPONSE TO MOTION TO DISMISS

Plaintiffs in the above styled and numbered cause present this Brief in Response to Defendants' Reply to Plaintiffs' Response to Defendants' Motion to Dismiss.

I.

PRELIMINARY MATTER

One matter must be clarified by Plaintiffs. Plaintiffs originally stated that 12 U.S.C. § 1823(e) was a "direct codification" of the doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), and that § 1823(e) and *D'Oench, Duhme* are applied identically. (Plaintiffs' Brief in Response to Motion to Dismiss, pages 3 and 6). Upon further review and analysis, Plaintiffs have determined that those initial statements are not wholly accurate. As will be shown below, § 1823(e) and *D'Oench, Duhme* are virtually identical, but there are some differences between the two doctrines. With this clarification presented, Plaintiffs will now show the Court why Defendant's Motion To Dismiss should be denied.

II.

AGREEMENTS IN CASE NOT CONTROLLED BY § 1823(e) OR *D'OENCH, DUHME*

A. The status of the law

Plaintiffs' primary argument is still that the "side agreements" in this case do not fall within the purview of either the common law doctrine of *D'Oench, Duhme & Co. v. FDIC*, *supra*, or 12 U.S.C. § 1823(e). Defendants' misunderstanding of the law and attempts to misconstrue the facts of this case necessitate a detailed explanation of the argument.

Case law under both the statute and common law shows the circumstances under which side agreements will be barred as a claim or defense. First, the agreement must constitute a scheme likely to deceive or mislead the banking authorities. *Langley v. FDIC*, 108 S. Ct. 396, 402 (1987); *D'Oench, Duhme*, *supra* at 460. In this regard, *D'Oench, Duhme* and its progeny state that a primary purpose in

prohibiting side agreements is to ensure that the FDIC can rely on the records of a failed bank in order to assess the worth of the bank's assets. Side agreements are prohibited because they seek to alter the terms of an asset, and hence the bank's records on that asset, meaning that the FDIC would be deceived by the records. *Howell v. Continental Credit Corp.*, 655 F.2d 743,747 (7th Cir. 1981), citing *Riverside Park Realty Co. v. FDIC*, 465 F. Supp. 305,313 (M.D. Tenn. 1978).

Second, the scheme must operate so as to defeat or diminish the FDIC's interest in an asset of the bank. As authority for this assertion, Plaintiffs cite the following language from *Riverside Park Realty, supra:*

> When the enforcement of a separate, collateral, or secret agreement would alter the terms of an asset acquired by the FDIC so that the FDIC's right, title, or interest in the asset would be defeated or diminished, § 1823(e) comes into play. *Id.*

It should be noted that § 1823(e) only concerns the FDIC acting in its corporate capacity, and therefore technically is not applicable in the case at bar because here the FDIC is acting only as a receiver. *FDIC v. McClanahan,* 795 F.2d 512, 516 (5th Cir. 1986). In such a situation, the common law doctrine of *D'Oench, Duhme* controls. *Id.* Nonetheless, § 1823(e) is basically a codification of *D'Oench, Duhme, FSLIC v. Murray,* 853 F.2d 1251, 1254 (5th Cir. 1988), and the rationale and purposes of the statutory and common law are virtually identical. It therefore follows that the side agreements prohibited by the common law must concern assets of a bank.

Such a requirement is axiomatic in a situation, such as this, where the FDIC is acting as receiver for a failed bank. In such a role, the only assets in which the FDIC obtains an interest are those assets held by the failed bank.

The cases show further that it is the "enforcement" of the agreement which must defeat or diminish the FDIC's interest in a bank's asset. In other words, a prohibited scheme is one which, if put into effect, would defeat or diminish the FDIC's interest in an asset. As authority for this argument, Plaintiffs refer the Court to Defendants' briefs. The cases cited therein involved side agreements which, if allowed, would have nullified the FDIC's interest in an asset of a bank. The Court should also note that those cases all involved side agreements concerning an asset held by the bank in question.

B. **The agreements in the case at bar are not barred.**

In order to understand why neither § 1823(e) nor *D'Oench, Duhme* apply to this case, one must first understand the nature of the "side agreements" in this case. The first agreement, as described in Paragraphs 16-19 of Plaintiffs' Original Petition, contained the following elements:

1) The individual Plaintiffs would obtain loans from BELL & MURPHY AND ASSOCIATES' (BMA) pension and profit sharing plans.

2) The individual Plaintiffs would then loan the money obtained to BMA.

3) MBA would then turn the money over to Defendant Bank.

4) The Bank would then apply the funds from the profit sharing plan to a debt BMA owed to the IRS (a debt incurred due to the Bank's misconduct as described in Paragraphs 14-15 of Plaintiff's Original Petition). The funds from the pension plan would in part be applied to an outstanding debt BMA owed the Bank.

There are several very significant aspects of the above agreement. First, the loans from the profit sharing and pension plans were not obtained through Defendant Bank. Those

loans were obtained from assets of the individual Plaintiffs. In other words, those loans were not assets of Defendant Bank. It follows that all allegations regarding the procurement of those loans likewise do not concern an asset of Defendant Bank. Second, the "outstanding debt" BMA owed to the Bank was an asset of Defendant Bank. This asset is the only asset of Defendant Bank that could have been affected by the above agreement, and the agreement did affect it since part of the pension plan proceeds would be applied to the debt. Lastly, and most significantly, the above agreement did not defeat or diminish the Bank's interest in its asset. The agreement would have *enhanced* the worth and collectability of the asset, for the agreement ensured that payments on the debt would be made.

Defendant Bank and Plaintiffs agreed to the above plan, but after Plaintiffs consented Defendant Bank demanded changes in the agreement (see Paragraph 21 of the Original Petition). The funds obtained from the pension and profit sharing plans were to be lumped together, with two-thirds of the funds going to Defendant Bank and one-third to the IRS. The Court should note that this revised agreement was forced upon Plaintiffs, meaning they "accepted" it under duress.

When the "agreement" finally went into effect on or about April 1, 1986, the Bank had added even more conditions (see Paragraph 23 of Original Petition). BMA's accounts receivable would be paid to the Bank. BMA would change its pay period and reduce pay to all executives and other employees. The Bank would also honor overdrafts on BMA's operating account, and any overdrafts would be repaid through BMA's accounts receivable. The purpose of the final agreement was to allow BMA to remain in business.

It is very difficult to see how any of the above agreements could have constituted a "scheme" to deceive the banking

authorities. Arguably, the agreements could have altered the Bank's records regarding its one asset involved. However, Plaintiffs have not alleged that the terms of their debt to the Bank were altered by the agreements, nor have Defendants made such a claim. If the Bank's records concerning its asset were not altered by the agreements, then the agreements do not violate the purpose of the common law or § 1823(e), and hence the agreements are not prohibited by those laws. Nevertheless, even if the agreements did alter the Bank's records, the agreements still did not violate the law.

If any of the above "agreements" had been carried out, the interest of the bank in its asset would have been enhanced, for the agreements provided for money originally beyond the control of Defendant Bank to be placed in the Bank's control, and furthermore, a significant amount of this money was to be applied to the asset. To reiterate, the agreements would have increased the worth and collectability of the Bank's asset because the agreements would have ensured that payments would be made on the debt. Given this fact there is no way the interest of the Bank in any of its assets would have been defeated or diminished.

If the Bank's interest in one of its assets could not have been diminished through "enforcement" of the agreements, how could the agreements diminish the interest of the FDIC in an asset acquired through the Bank? Plaintiffs maintain that the FDIC's interest could not possibly be adversely affected.

Another very significant point is that the agreements were never really carried out. The Plaintiffs' primary complaint is that the Defendant Bank *breached* the agreements to the severe detriment of Plaintiffs.

Furthermore, Plaintiffs are not seeking enforcement of the agreements. Any such action would be moot, for the damage has already been done, and enforcement of the agreements is

not possible. Plaintiffs need to further distinguish two cases cited by Defendants. Both *FDIC v. Langley*, 792 F.2d 541 (5th Cir. 1986), aff'd, 108 S.Ct. 396 (1987) and *FDIC v. Huston*, 1988 W.L. 97621 (N.D. Tex. Aug. 22, 1988, Robinson, J.) concerned situations in which the Defendants were not seeking to enforce the side agreements in question and yet their defenses were still barred. The defenses raised were based on the side agreements in that the defendants were claiming that the existence of the agreements relieved them of any obligation to pay their debts. There are several distinguishing factors. First, Plaintiffs are not claiming they are not obligated to pay their debt. Second, the side agreements in *Langley* and *Huston* directly and exclusively concerned the debt obligations being sued upon. That is to say that the agreements concerned an asset of the failed banks. As shown above, such is not the case here. Therefore, *Langley* and *Huston* do not defeat Plaintiffs' arguments in any way.

The preceding analysis establishes the following conclusions:

1) The agreements in question did not deceive the banking authorities in that the agreements did not alter the Bank's records regarding one of its assets; and

2) The agreements did not defeat or diminish the Bank's, and hence the FDIC's, interest in the only asset of the Bank involved in the agreements in that the agreements would have actually increased the worth and collectability of that asset.

As a result, the agreements do not violate the policies and purposes of § 1823(e) and *D'Oench, Duhme*, meaning that Plaintiffs' claims based on those agreements are not barred.

C. Analysis of Defendants' arguments

Plaintiffs further state that Defendants have in no way refuted or contested the above arguments. Plaintiffs have argued, and still argue, that the agreements in question and the claims under those agreements do not affect the collectability of an asset held by the FDIC. Defendants do not contest this issue. Instead, Defendants rely on their claim that the agreements

> most certainly dilute the *worth* of those loans. It is a matter of simple accounting and arithmetic: if Plaintiffs recover damages based upon the side agreements, the recovered damages would be a direct offset against the value of the outstanding notes and loans. (Defendants' Reply Brief, p. 4) (emphasis in original).

There are many problems with Defendants' argument. The argument at first blush seems to be persuasive, but Defendants are totally missing the point. Before a defense or claim based on a "side agreement" can be barred, the side agreement must violate *D'Oench, Duhme* and/or § 1823(e) as set out in I A of this Brief. The whole purpose of those doctrines is to prohibit defenses and claims based on *illegal* side agreements. If the agreements are not illegal, any defenses or claims based on those agreements *are not* barred by *D'Oench, Duhme* or § 1823(e). Plaintiffs have shown that the agreements here are not illegal; therefore, Defendants' argument fails.

Another problem with Defendants' argument is that Defendants appear to be confused. Defendants claim that any recovery by Plaintiffs would be a "direct offset" against "outstanding notes and loans." Plaintiffs' question is, "What outstanding notes and loans?" Perhaps Defendants are referring to the loans from the profit sharing and pension plans. However, it has been established that these loans were and are not assets of Defendant Bank. In other words, those loans

are not "outstanding notes and loans" owed to Defendant Bank. Therefore, any recovery by Plaintiffs could not be a "direct offset" on those loans. That leaves only the admitted outstanding debt owed by BMA to Defendant Bank. Perhaps it is better to say "supposed outstanding debt." Defendants have never once claimed that Plaintiffs owe them money. One would think that if Plaintiffs did owe the Bank, the FDIC would have said so. In fact, one would think that the FDIC would have a duty to raise such issue. The duty would be twofold: 1) in order to fulfill its legal mandate as receiver, the FDIC would be obligated to collect the money owed, and 2) surely such a claim would be a *compulsory* counterclaim under FRCP 13 (a). However, the FDIC has made no such claim. It can be inferred that Plaintiffs do not owe any money to the Defendant Bank, meaning there is no outstanding note or loan held by the FDIC which would be "directly offset" by this suit.

Another of Defendants' arguments must be discussed. On page 21 of Defendant's Original Brief in Support of Motion to Dismiss, Defendants argue that the letter agreements in this case do not comply with the literal requirements of § 1823(e), and should therefore be barred. This noncompliance with § 1823(e) is the only basis Defendants explicitly put forth for claiming the agreements should be barred. Once again, Defendants are not cognizant of the law. As pointed out on page 3 of this Brief, and in cases cited by Defendants, § 1823(e) applies *only* when the FDIC is acting in its *corporate* capacity. In this case, the FDIC is acting in its *receivership* capacity. In such a situation, the common law of *D'Oench, Duhme* controls. *McClanahan, supra; Huston, supra* at page 13 of slip opinion. In other words, the letter of the law of § 1823(e) in inapplicable, but the policies and doctrines of the law (the spirit of the law) are applicable. Consequently, Defendants' argument that the letter agree-

ments should be barred because they violate the "letter of the law" under § 1823(e) is wholly without merit.

D. Summary

In summary, Defendants have misunderstood and misconstrued both the applicable law and the facts of this case. Necessarily, then, Defendants' application of the law to the facts of this case is faulty. Consequently, Defendants' arguments fail, and their Motion To Dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Plaintiffs' Response to Defendants' Reply to Plaintiffs' Brief in Response to Motion to Dismiss has been mailed certified, returned receipt requested to William Frank Carroll, Attorney For Defendants, 500 Trammel Crow Center, 2001 Ross Avenue, Dallas, Texas 75201-2916, on this ____ day of April, 1989.

____

JOSEPH E. ASHMORE, JR.

IN THE
United States District Court
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BELL & MURPHY AND ASSOCIATES, INC., ET AL. vs. CHARLES E. JOBE, ET AL.	CIVIL ACTION NO. 4-88-553-E

ORDER

Before the Court is the motion to dismiss of defendants FDIC as Receiver of First RepublicBank Dallas, NCNB Texas National Bank, and Charles E. Jobe and plaintiffs' response thereto. After thorough consideration of the pleadings and applicable law, the Court determines that the motion shall be GRANTED.

Defendants removed this case to federal court from the 352nd Judicial District Court of Tarrant County Texas. The plaintiffs' petition alleges claims based on fraud, including fraudulent misrepresentation and fraudulent inducement. These claims are all based on an alleged oral agreement with the failed First RepublicBank-Gateway.

The Court determines that the claims against all defendants shall be DISMISSED without prejudice for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The alleged oral agreement is the type of oral, collateral agreement that courts have refused to enforce against the FDIC in its capacity as receiver under the doctrine of *D'Oench, Dume & Co., v. FDIC.*[1] The oral agreement

[1] 315 U.S. 447 (1944); *See also Beighley v. FDIC*, 868 F.2d 776 (5th Cir. 1989).

is likewise unenforceable against the FDIC in its corporate capacity under 12 U.S.C. § 1823(e) for failure to comply with the categorical requirements of the statute. *Langley v. FDIC*, 484 U.S. 86 (1987). Because plaintiffs have failed to state a claim against defendant Jobe in his individual capacity, such claims shall also be DISMISSED without prejudice under Rule 12(b)(6).

Signed this 6th day of July, 1989.

ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

IN THE

U.S. Court of Appeals

FIFTH CIRCUIT

BELL & MURPHY AND ASSOCIATES, INC., JOHN W. BELL, JR., HAROLD D. BARNETT, ROBERT D. HAMER, JR., and RICHARD L. MEARS, *Plaintiffs,* vs. CHARLES E. JOBE AND FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR FIRST REPUBLICBANK DALLAS, N.A., (F/K/A/ FIRST REPUBLICBANK GATEWAY, N.A.) and NCNB TEXAS NATIONAL BANK, N.A. *Defendants.*	CASE NO. 89-1719

BRIEF OF APPELLANT

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ATTORNEY FOR PLAINTIFFS

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STATUTES:

CERTIFICATE OF INTERESTED PERSONS

No. 89-1719

Bell & Murphy and Associates, Inc., John W. Bell, Jr., Harold D. Barnett, Robert D. Hamer, Jr., and Richard L. Mears

vs.

Charles E. Jobe and Federal Deposit Insurance Corporation, as receiver for First Republicbank Dallas, N.A. (f/k/a First Republic-Bank Gateway, N.A.), and NCNB Texas National Bank, N.A.

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

1. Bell & Murphy and Associates, Inc. (Appellant and plaintiff below)

2. John W. Bell, Jr. (Appellant and plaintiff below, current president and shareholder of Bell & Murphy and Associates, Inc.)

3. Harold D. Barnett (Appellant and plaintiff below, former employee of Bell & Murphy and Associates, Inc.)

4. Robert D. Hamer, Jr. (Appellant and plaintiff below, former employee of Bell & Murphy and Associates, Inc.)

5. Richard L. Mears (Appellant and plaintiff below, former employee of Bell & Murphy and Associates, Inc.)

6. Charles E. Jobe (Appellee and defendant below, officer of defendant bank)

7. Federal Deposit Insurance Corporation (Appellee and defendant below, receiver of defendant bank)

8. NCNB Texas National Bank (Appellee and defendant below)

9. Mrs. John W. Bell, Jr. (Current officer of Bell & Murphy and Associates, Inc.)

JOSEPH E. ASHMORE, JR.
Joseph E. Ashmore, Jr.
Attorney of record for
all Appellants

STATEMENT REGARDING ORAL ARGUMENT

Appellants believe the issues of this appeal can be sufficiently addressed through the briefs of the parties, and hereby waives oral argument.

STATEMENT OF JURISDICTION

This court has jurisdiction over this cause in that the District Court's order of dismissal of the action below represented a final decision of the District Court pursuant to 28 U.S.C. Section 1291.

STATEMENT OF FACTS

The sole issue in this appeal is as follows:

Did the District court err in dismissing the action below for failure to state a claim against any defendant pursuant to the common law doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), and the provisions of 12 U.S.C. § 1823(e)?

STATEMENT OF THE CASE

A. *Course of proceedings and disposition in the Courts below*

This case originated in the courts of the State of Texas. Bell & Murphy and Associates, Inc. (hereinafter "BMA") and the individual Appellants (who will hereinafter be included in any reference to BMA unless otherwise noted) filed suit in the 352d District Court of Tarrant County, Texas. (Record, hereinafter "R,"0006). The defendants to the suit were originally Charles E. Jobe (hereinafter "Jobe") and the Interfirst Bank Gateway, N.A. Subsequently, Interfirst Bank became First Republicbank Gateway, N.A., and then the First Republicbank system failed. The FDIC became receiver of the failed bank, and NCNB Texas National Bank (hereinafter "NCNB") acquired First Republicbank. Due to this course of events, NCNB and FDIC became parties to the suit. (R.0007).

FDIC then sought removal of the suit to the United States District Court for the Northern District of Texas, Fort Worth

Division. (R. 0001). The removal petition was amended to include Jobe (R. 00021), and eventually the entire case was removed to federal court. (R. 0023).

FDIC and NCNB next moved for dismissal of the suit for failure to state a claim. (R. 0048). The motion was based on the doctrines of *D'Oench, supra,* and 12 U.S.C. § 1823(e). *Id.* The District Court granted the motion, dismissed the suit (R. 0243), and this appeal followed.

Below is a summary of the facts of this case. Only a summary is presented here because many items which could be included must be stated in conjunction with the arguments of the brief, and Appellants wish to avoid lengthening this brief through unnecessary repetition.

Appellants must also state that many of the relevant facts are actually allegations in the Original Petition. However, this Court must accept these allegations as true since the case below was dismissed for failure to state a claim. *Jenkins v. McKeithen,* 395 U.S. 411, 421-422 (1969).

Several different bank names are involved in this case, but all names essentially apply to one bank. Interfirst became First Republicbank, which in turn became NCNB. Regardless of what names are applicable at what times, there is but one bank which engaged in the conduct which is the basis of this action. Therefore, in order to avoid confusion, this brief will henceforth refer to "Bank" unless it is necessary to use a specific bank name.

With the above statements in mind, Appellants present the following summary of facts.

1. BMA's business involved consultation and exploration regarding oil and gas. (R. 0008).

2. Due to the nature of the Texas economy and the oil and gas industry, BMA began experiencing major financial difficulties in 1985. (R. 0008).

3. At that time, BMA had a seventeen-year history of doing business at the defendant Bank. (R. 0008).

4. BMA sought assistance from the Bank, and the parties reached an agreement. (R. 0008).

5. This agreement was breached by the Bank. (R. 0008).

6. The Bank demanded a new agreement, and BMA, due to its condition and action in reliance of the first agreement, had no choice but to accept the Bank's demands. (R. 0009).

7. After the revised agreement became effective, the Bank added even more conditions. (R. 0009).

8. Again, BMA had no choice but to agree to the additional demands. (R. 0010).

9. The Bank also breached this subsequent agreement. (R. 0010).

10. The Bank's misrepresentations, mismanagement, and breach of the agreements effectively destroyed BMA.

The details and nature of the agreements are of vital importance to this case, but such matters will be presented with the argument portion of the brief.

SUMMARY OF ARGUMENT

Appellants present five basic arguments showing that the District Court erred in dismissing BMA's suit.

I. The agreements at issue are not barred by *D'Oench* or Section 1823(e) because:

A. The agreements did not alter the terms of any outstanding debt to the Bank, and thus did not alter the Bank's records regarding one of its assets.

B. Had the agreements been carried out, they would not have defeated or diminished the Bank's, and hence the FDIC's, interest in its asset.

C. It is very possible that there is no asset which could be affected by this suit.

II. The agreements are not barred because BMA did not commit any kind of fault in entering into the agreements.

III. The agreements are not barred because they established bilateral obligations, and it is the Bank's breach of these obligations that serves as the basis for this suit.

IV. BMA's claims are not barred by *Gunter v. Hutcheson*, 674 F.2d 862 (11th Cir. 1982), or *FDIC v. Gulf Life Insurance Co.*, 737 F.2d 1513 (11th Cir. 1984).

V. BMA's affirmative claims are not barred as to FDIC or the Bank.

I.

AGREEMENTS NOT CONTROLLED BY § 1823(e) OR D'OENCH

BMA's primary argument is that the "side agreements" in this case do not fall within the purview of either the common law doctrine of *D'Oench, supra*, or 12 U.S.C. § 1823(e).

A. The status of the law

Case law under both the statute and common law shows the circumstances under which side agreements will be barred as a claim or defense. First, the agreement must constitute a scheme likely to deceive or mislead the banking

authorities. *Langley v. FDIC*, 108 S. Ct. 396, 402 (1987); *D'Oench, supra* at 460. In this regard, *D'Oench,* and its progeny state that a primary purpose in prohibiting side agreements is to ensure that the FDIC can rely on the records of a failed bank in order to assess the worth of the bank's assets. Side agreements are prohibited because they seek to alter the terms of an asset, and hence the bank's records on that asset, meaning that the FDIC would be deceived by the records. *Howell v. Continental Credit Corp.*, 655 F.2d 743,747 (7th Cir. 1981), citing *Riverside Park Realty Co. v. FDIC,* 465 F. Supp. 305,313 (M.D. Tenn. 1978).

Second, the scheme must operate so as to defeat or diminish the FDIC's interest in an asset of the bank. As authority for this assertion, Plaintiffs cite the following language from *Riverside Park Realty, supra:*

> When the enforcement of a separate, collateral, or secret agreement would alter the terms of an asset acquired by the FDIC so that the FDIC's right, title, or interest in the asset would be defeated or diminished, § 1823(e) comes into play. *Id.*

It should be noted that § 1823(e) only concerns the FDIC acting in its corporate capacity, and therefore technically is not applicable in the case at bar because here the FDIC is acting only as a receiver. *FDIC v. McClanahan,* 795 F.2d 512, 516 (5th Cir. 1986). In such a situation, the common law doctrine of *D'Oench,* controls. *Id.* Nonetheless, § 1823(e) is basically a codification of *D'Oench, FSLIC v. Murray,* 853 F.2d 1251, 1254 (5th Cir. 1988), and the rationale and purposes of the statutory and common law are virtually identical. It therefore follows that the side agreements prohibited by the common law must concern assets of a bank.

Such a requirement is axiomatic in a situation, such as this, where the FDIC is acting as receiver for a failed bank. In

such a role, the only assets in which the FDIC obtains an interest are those assets held by the failed bank.

The cases show further that it is the "enforcement" of the agreement which must defeat or diminish the FDIC's interest in a bank's asset. In other words, a prohibited scheme is one which, if put into effect, would defeat or diminish the FDIC's interest in an asset. As authority for this argument, BMA refers the Court to FDIC's and the bank's briefs in the District Court. (R. 0051). The cases cited therein involved side agreements which, if allowed, would have nullified the FDIC's interest in an asset of a bank. The Court should also note that those cases all involved side agreements concerning an asset held by the bank in question.

B. The agreements in the case at bar are not barred

In order to understand why neither § 1823(e) nor *D'Oench* apply to this case, one must first understand the nature of the "side agreements" in this case. The first agreement, as described in Paragraphs 16-19 of Plaintiffs' Original Petition, (R. 0008), contained the following elements:

(1) The individual Appellants would obtain loans from BMA pension and profit sharing plans.

(2) The individuals would then loan the money obtained to BMA.

(3) BMA would then turn the money over to the Bank.

(4) The Bank would then apply the funds from the profit sharing plan to a debt BMA owed to the IRS (a debt incurred due to the Bank's misconduct as described in Paragraphs 14-15 of Plaintiff's Original Petition, R. 0008). The funds from the pension plan would in part be applied to an outstanding debt BMA owed the Bank.

There are several very significant aspects of the above agreement. First, the loans from the profit sharing and pension plans were not obtained through the Bank. Those loans were obtained from assets of the individual Appellants. In other words, those loans were not assets of the Bank. It follows that all allegations regarding the procurement of those loans likewise do not concern an asset of the Bank. Second, the "outstanding debt" BMA owed to the Bank was an asset of the Bank. This asset is the only asset of the Bank that could have been affected by the above agreement, and the agreement did affect it since part of the pension plan proceeds would be applied to the debt. Lastly, and most significantly, the above agreement did not defeat or diminish the Bank's interest in its asset. The agreement would have *enhanced* the worth and collectability of the asset, for the agreement ensured that payments on the debt would be made.

The Bank and BMA agreed to the above plan, but after BMA consented the Bank demanded changes in the agreement (as described in Paragraph 21 of the Original Petition, R. 0009). The funds obtained from the pension and profit sharing plans were to be lumped together, with two-thirds of the funds going to Defendant Bank and one-third to the IRS. The Court should note that this revised agreement was forced upon BMA, meaning it was "accepted" under duress (a fact whose significance will be discussed later).

When the "agreement" finally went into effect on or about April 1, 1986, the Bank had added even more conditions (See Paragraph 23 of Original Petition, R. 0010). BMA's accounts receivable would be paid to the Bank. BMA would change its pay period and reduce pay to all executives and other employees. The Bank would also honor overdrafts on BMA's operating account, and any overdrafts would be repaid through BMA's accounts receivable. The purpose of the final

agreement, as stated in Paragraph 23 of the Original Petition (R. 0010), was to allow BMA to remain in business.

It is very difficult to see how any of the above agreements could have constituted a "scheme" to deceive the banking authorities. Arguably, the agreements could have altered the Bank's records regarding its one asset involved. However, BMA has not alleged that the terms of their debt to the Bank were altered by the agreements, nor have Appellees made such a claim. If the Bank's records concerning its asset were not altered by the agreements, then the agreements do not violate the purpose of the common law or § 1823(e), and hence the agreements are not prohibited by those laws. Nevertheless, even if the agreement did alter the Bank's records, the agreements still did not violate the law.

If any of the above "agreements" had been carried out, the interest of the bank in its asset would have been enhanced, for the agreements provided for money originally beyond the control of the Bank to be placed in the Bank's control, and furthermore, a significant amount of this money was to be applied to the asset. To reiterate, the agreements would have increased the worth and collectability of the Bank's asset because the agreements would have ensured that payments would be made on the debt. Given this fact there is no way the interest of the Bank in any of its assets would have been defeated or diminished.

If the Bank's interest in one of its assets could not have been diminished through "enforcement" of the agreements, how could the agreements diminish the interest of the FDIC in an asset acquired through the Bank? Plaintiffs maintain that the FDIC's interest could not possibly be adversely affected.

Another very significant point is that the agreements were never really carried out. BMA's primary complaint is that the

Bank *breached* the agreements to the severe detriment of BMA.

Furthermore, BMA is not seeking enforcement of the agreements. Any such action would be moot, for the damage has already been done, and enforcement of the agreements is not possible. BMA needs to further distinguish two cases cited by the Bank and FDIC. Both *FDIC v. Langley*, 792 F.2d 541 (5th Cir. 1986), aff'd, 108 S.Ct. 396 (1987) and *FDIC v. Huston*, 1988 W.L. 97621 (N.D. Tex. Aug. 22, 1988, Robinson, J.) concerned situations in which the defendants were not seeking to enforce the side agreements in question and yet their defenses were still barred. The defenses raised were based on the side agreements in that the defendants were claiming that the existence of the agreements relieved them of any obligation to pay their debts. There are several distinguishing factors. First, BMA is not claiming it is not obligated to pay its debt. BMA is questioning the validity of that debt. Second, the side agreements and the defenses based on those agreements in *Langley* and *Huston* directly and exclusively concerned the debt obligations being sued upon. That is to say that the agreements concerned an asset of the failed banks. As shown above, such is not the case here. The agreements in the case at bar involved an asset of Defendant Bank in a *secondary* manner, and, as also shown above, affected that asset in a positive way. Therefore, *Langley* and *Huston* do not defeat Plaintiffs' arguments in any way.

The preceding analysis establishes the following conclusions:

1) The agreements in question did not deceive the banking authorities in that the agreements did not alter the Bank's records regarding one of its assets; and

2) The agreements did not defeat or diminish the Bank's, and hence the FDIC's, interest in the only asset of the Bank involved in the agreements in that the agree-

> ments would have actually increased the worth and collectability of that asset.

As a result, the agreements do not violate the policies and purposes of § 1823(e) and *D'Oench*, meaning that BMA's claims based on those agreements are not barred.

C. Analysis of Appellees' arguments in the District Court

BMA further states that Appellees in no way refuted or contested the above arguments. BMA has argued that the agreements in question and the claims under those agreements do not affect the collectability of an asset held by the FDIC. The Bank and FDIC did not contest this issue. Instead, they relied on their claim that the agreements

> most certainly dilute the *worth* of those loans. It is a matter of simple accounting and arithmetic: if Plaintiffs recover damages based upon the side agreements, the recovered damages would be a direct offset against the value of the outstanding notes and loans. (R. 0191) (emphasis in original).

There are many problems with this argument. The argument at first blush seems to be persuasive, but it misses the point. Before a defense or claim based on a "side agreement" can be barred, the side agreement must violate *D'Oench*, and/or § 1823(e). The whole purpose of those doctrines is to prohibit defenses and claims based on *illegal* side agreements. If the agreements are not illegal, any defenses or claims based on those agreements *are not* barred by *D'Oench* or § 1823(e). BMA has shown that the agreements here are not illegal; therefore, Appellees' argument fails.

Another problem with the argument is that carried to its logical extreme, it would in effect bar all claims and defenses against the FDIC that would adversely affect any asset of a failed bank if any kind of side agreement were involved. The

side agreement would not even have to concern an asset of the bank. If the agreement did concern an asset of the bank, the asset affected by the claim or defense based on the agreement would not have to be the asset involved in the agreement. Such results do not serve the public policies of § 1823(e) and *D'Oench*. This and the previous paragraph show that FDIC and the Bank are attempting to bootstrap a legal position which exceeds the parameters of the law.

Another problem with the argument is that FDIC and the Bank appear to be confused. They claimed that any recovery by BMA would be a "direct offset" against "outstanding notes and loans." BMA's question is, "What outstanding notes and loans?" Perhaps FDIC and the Bank are referring to the loans from the profit sharing and pension plans. However, it has been established that these loans were and are not assets of the Bank. In other words, those loans are not "outstanding notes and loans" owed to the Bank. Therefore, any recovery by BMA could not be a "direct offset" on those loans. That leaves only the admitted outstanding debt owed by BMA to the Bank. Perhaps it is better to say "supposed outstanding debt." FDIC and the Bank have never once claimed that BMA owes them money. One would think that if BMA did owe the Bank, the FDIC would have said so. In fact, one would think that the FDIC would have a duty to raise such issue. The duty would be twofold: 1) in order to fulfill its legal mandate as receiver, the FDIC would be obligated to collect the money owed, and 2) surely such a claim would be a *compulsory* counter-claim under FRCP 13(a). However, the FDIC has made no such claim. It can be inferred that Bank does not owe any money to the Defendant Bank, meaning there is no outstanding note or loan held by the FDIC which would be "directly offset" by this suit.

Another of the Bank's and FDIC's arguments must be discussed. On page 21 of Defendants' Original Brief in Sup-

port of Motion to Dismiss (R. 0076), they argued that the letter agreements in this case do not comply with the literal requirements of § 1823(e), and should therefore be barred. This noncompliance with § 1823(e) is the only basis FDIC and the Bank explicitly put forth for claiming the agreements should be barred. Once again, FDIC and the Bank are not cognizant of the law. As pointed out in this Brief, and in cases cited by FDIC and the Bank, § 1823(e) applies *only* when the FDIC is acting in its *corporate* capacity. In this case, the FDIC is acting in its *receivership* capacity. In such a situation, the common law of *D'Oench*, controls. *McClanahan, supra; Huston, supra* at page 13 of slip opinion. In other words, the letter of the law of § 1823(e) is inapplicable, but the policies and doctrines of the law (the spirit of the law) are applicable. Consequently, Appellees' argument that the letter agreements should be barred because they violate the "letter of the law" under § 1823(e) is wholly without merit.

D. Agreements regarding checking account are irrelevant

Paragraphs 13-15 of the Original Petition, (r.008), describe agreements and actions regarding BMA's checking account. Such agreements and actions are not controlled by *D'Oench* or § 1823(e) for the simple reason that BMA's checking account was not an *asset* of the Bank. It was a liability.

Furthermore, BMA's claims are not based on the checking account agreements and actions. Those agreements and actions are separate and distinct from the agreements previously discussed. In part, the Bank's actions with the checking account created the need for the other agreements. If the other agreements had been carried out, BMA would not have been harmed. However, these other agreements were breached by the Bank, and such breach is the basis of this suit. In other words, the checking account has nothing to do with this cause of action other than to serve as a factual background and to illustrate a course of conduct by the Bank.

E. Summary

In summary, FDIC and the Bank misunderstood and misconstrued both the applicable law and the facts of this case. Necessarily, then, their application of the law to the facts of this case is faulty. Consequently, the District Court's granting of the Motion To Dismiss was error.

II.

D'OENCH NOT CONTROLLING BECAUSE BMA WAS FAULTLESS

A. Showing of fault

There is another factor which must be present before BMA's claims can be barred. In considering this particular factor, the Court should keep in mind that *D'Oench*, not § 1823(e), governs this case. The additional factor is that the party asserting a claim or defense based on an illegal side agreement must be guilty of some sort of fault in order for the claim or defense to be barred. *Gunter v. Hutcheson*, 674 F.2d 862,872 (11th Cir. 1982), cert. denied, 103 S.Ct. 60 (1982). As further authority for this fault requirement, BMA cites *FDIC v. Meo*, 505 F.2d 790 (9th Cir. 1974), in which the Court held that the defendant was "wholly innocent of any wrongdoing or negligence" regarding a deceptive scheme, and therefore *D'Oench* did not bar the Defendant's defense. *Id.* at 793.

B. Types of fault

1. *Voluntary participation*

The first type of fault occurs when a party voluntarily enters into a forbidden side agreement. This "voluntary fault" has its origins in *D'Oench* itself. In that case, the FDIC sued the Petitioner (D'Oench, Duhme & Co.) on some notes. Petitioner asserted as a defense receipts which stated, "This

note is given with the understanding that it will not be called for payment." These receipts were not part of the records of the bank which issued the notes.

Other pertinent facts in *D'Oench, Duhme, supra*, are as follows. Petitioner sold bonds to the bank, and these bonds subsequently defaulted. The original note was issued by the bank so that the bank could carry the note without showing any past due bonds, thereby falsely inflating the bank's assets. The note was renewed on a continual basis. Petitioner knew the fraudulent purpose of the note and allowed the bank to renew the note. In 1934, subsequent to the issuance of the first note, the FDIC insured the bank. In 1938, the bank required a loan from the FDIC in order to remain solvent. The FDIC acquired as collateral the notes issued to Petitioner. In effect, the bank had used the note to pad its assets in order to obtain the FDIC loan.

The Petitioner did not participate in the FDIC transaction or even know of it. Petitioner, however, did know that the note was fraudulent, knew it was being used for a fraudulent purpose, and knowingly allowed the note to be renewed. The Supreme Court found the arrangement regarding the note to be a scheme designed to deceive the banking authorities. *Id.* at 460-461. Even more significantly, the Court ruled that given Petitioner's knowledge as set out above, Petitioner "was responsible for the creation of the false status of the note" and that petitioner "made possible" the fraudulent arrangement. *Id.*

The ruling was that since petitioner knew the purpose of the arrangement, knew it could deceive the authorities, and willingly executed the arrangement, its defense based on the arrangement violated public policy and would be barred. The strong implication was that since Petitioner voluntarily participated in the scheme, the defense was barred.

This implication has since become law. In *FDIC v. Powers*, 576 F. Supp. 1167 (N.D. Ill. 1983), aff'd, 753 F.2d 1076 (7th Cir. 1984), the Court ruled

> It is all the more appropriate to apply *D'Oench* to bar defenses arising from irregularities to which the defendant *intentionally has committed. Id.* at 1171 (emphasis added).

The above passage establishes voluntary, intentional conduct as a form of fault.

Although § 1823(e) is not controlling here, it is nonetheless interesting to note that voluntary participation in a scheme to deceive the banking authorities is also a prerequisite to invoking § 1823(e). As stated in *FDIC v. Hatmaker*, 756 F.2d 34 (6th Cir. 1985)

> That such an agreement might have been fraudulently induced is immaterial; what is important is that the borrower *voluntarily entered into such a side agreement. Id.* at 37 (emphasis added).

The above language was favorably cited and relied upon by the Fifth Circuit in *FDIC v. Castle*, 781 F.2d 1101, 1107 (5th Cir. 1986).

It is apparent, then, that the Fifth Circuit requires a showing of voluntary participation in a scheme before § 1823(e) is applied. Plaintiffs have been unable to find a Fifth Circuit case which addresses the issue as it concerns the common law. However, it can be reasonably inferred that voluntary participation is considered by the Fifth Circuit as an element of the common law as well. Such inference is strengthened by the fact that the Fifth Circuit explicitly recognized the "important policy considerations" regarding the common law expressed by the *Powers* Court. *Id.* at 1108, n.3.

2. *Negligence*

Another type of fault is negligence. Good examples of negligence are found in *McClanahan, supra.* In that case, McClanahan signed a blank promissory note, and then delivered it to a man McClanahan knew had been convicted of bank fraud. When problems arose regarding the note, McClanahan only contacted this same man, who then forged McClanahan's signature on a renewal note. The Fifth Circuit ruled that McClanahan's conduct was reckless, and thus his defenses were barred by *D'Oench. Id.* at 516-517. Another example of negligence appears in *Powers, supra.* In that case, the defendant signed a guarantee contract in blank. The Court held that "executing guarantees in blank is not good practice." *Id.* at 1171. As a result, the Court ruled that Powers' defense based on side agreements concerning the guarantee were barred by *D'Oench: Id.* at 1171-1172.

3. *Knowingly contributing to a misrepresentation*

D'Oench directly gives rise to yet another type of fault, namely situations in which a party knowingly contributes to a misrepresentation regarding an asset of a bank. (See discussion on pages 12-13 of this Brief). Indeed, this aspect of *D'Oench* has been followed by the courts. *FDIC v. Leach,* 772 F.2d 1262, 1267 (6th Cir. 1985); *FDIC v. Julius Richman, Inc.,* 80 F.R.D. 114,117 (E.D.N.Y. 1978).

4. *Summary*

The above authorities show three types of fault which would trigger the common law prohibition of claims and defenses against the FDIC. These types of fault are:

1. voluntarily participating in a scheme prohibited by law, or

2. some sort of negligence, or

3. knowingly contributing to a misrepresentation concerning a bank's assets.

C. There is no fault present.

None of the above types of fault are present in the case at bar. Plaintiff has shown at length that the agreements in question do not violate the law. However, even if the Court finds to the contrary, the agreements are not barred. BMA's cause of action is *not* based on agreements in which BMA voluntarily took part. The cause of action is based on the breach of the agreement which went in effect on or about April 1, 1986. As alleged, BMA was fraudulently induced into taking action which led to this agreement, and then BMA was *forced* to enter into the "agreement" *under duress*. Given these facts, there is no possible way that BMA voluntarily entered into the agreement.

Furthermore, BMA was not guilty of any negligence. None of the types of negligence discussed above are present in the case at bar. The only possible negligence committed by BMA could be its failure to discover that the Bank and Jobe were making fraudulent misrepresentations and had no intention of honoring any agreement. Given BMA's previously good seventeen year relationship with the Bank, it is difficult to find fault with BMA in this respect.

The third type of fault is likewise missing. As discussed above, the agreements in question do not in any way involve misrepresentations about an asset of the Bank. Additionally, even if the previous sentence is incorrect, there is no indication that BMA knowingly had anything to do with such misrepresentation.

D. FDIC and the Bank failed to allege and show fault.

The Court should note that FDIC and the Bank failed to allege in any fashion that BMA was at fault. Appellees might

likely counter by claiming that a showing of fault is unnecessary. In support of such argument, they might cite the following language from *Powers, supra:*

> In *D'Oench* the Supreme court made clear the invalidity of defenses arising from Defendants' complicity in a secret, irregular arrangement, *even if the Defendants' actions did not amount to fraud or illegality. Id.* at 1171-1172 (emphasis added).

They might rely on the emphasized portion of the above passage; however, please note that the above passage also mentions *complicity*. Therefore, the above passage supports BMA's "voluntary participation" requirement.

FDIC and the Bank could also argue that a party's intent in making a side agreement is irrelevant. *Langley, supra* at 792 F.2d 545; *FDIC v. Investors Associates X, Ltd.*, 775 F.2d 152, 155 (6th Cir. 1985). While such a statement is correct, it does not alter BMA's arguments. The statement does not render a showing of fault unnecessary. Also, intent has nothing to do with negligence, nor does it address the fact that a person could intend not to deceive, but could nonetheless still voluntarily lend himself to a deceptive arrangement.

FDIC and the Bank could also cite *D'Oench* for the facts that the Petitioner there was ignorant of the fraudulent scheme as to the FDIC and yet its defense was barred. Please keep in mind that the Petitioner in *D'Oench* had knowledge that the notes were fraudulent and were issued in order to pad the bank's assets. In other words, the Petitioner knowingly participated in a misrepresentation concerning a bank's asset.

FDIC and the Bank might also try to rebut the fault requirement with the following statement from *Powers, supra*: "*D'Oench* has been applied to bar defenses apparently not attributable to the conduct of the Defendants." *Id.* at

1171, citing *Gunter, supra.* Such pronouncement seems to defeat BMA's fault argument, but a close examination of *Gunter* shows this not to be the case.

The *Gunter* court based its ruling on common law; however, that common law basis was not *D'Oench.* The facts of *Gunter* provide the basis of the analysis. The Gunters sought controlling interest in a bank. In order to gain such interest, they obtained a loan from a second bank and signed a promissory note. The second bank subsequently failed, and the FDIC acquired the note in a purchase and assumption transaction. The first bank failed shortly afterwards. The Gunters then sued the FDIC, seeking rescission of the note based on a claim of fraud in the inducement. The FDIC counterclaimed for payment on the note. The last significant fact is that the case did not involve a side agreement in any way.

The Eleventh Circuit was faced with somewhat of a dilemma. Due to the fact that no oral side agreement was involved, the Court determined that § 1823(e) was inapplicable. *Id.* at 867. However, the court felt that the FDIC, given its purpose, should probably be protected against fraud claims of the type asserted by the Gunters. The Court then undertook an analysis under *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) to determine if a federal common law rule should be devised to govern the situation. *Id.* at 868-873.

Using *Kimbell Foods, supra,* the Court found a need to fashion a uniform federal rule. The result of the Court's effort appears below.

> Accordingly, we hold that as a matter of federal common law, the FDIC has a complete defense against state and common law fraud claims *on a note acquired by the FDIC in the execution of a purchase and assumption transaction, for value, in good faith, and without actual knowledge of*

> *the fraud at the time the FDIC entered into the purchase and assumption agreement. Id.* at 873 (emphasis added).

Please note that the above rule is very specific and narrow. It applies *only* to actions concerning notes the FDIC purchases through purchase and assumption agreements. It also requires that FDIC must have no knowledge of the fraud when it acquires the note. The significance of this requirement will be discussed in IV below.

A review of the facts, analysis, and holding of *Gunter* clearly show that the common law rule created therein is not based on *D'Oench.* There are two basic reasons for this fact: 1) the Court ruled that § 1823(e) was inapplicable because no side agreement was involved, and 2) § 1823(e) is a codification of *D'Oench.* It follows that *D'Oench* was also inapplicable since no side agreement was involved. Recall also that the primary policy and purpose of both *D'Oench* and § 1823(e) is to prohibit claims and defenses based on side agreements. In short, *D'Oench* does not control unless some sort of side agreement is being asserted. Since the rule in *Gunter* does not concern a side agreement, the rule is not based on *D'Oench.* The significance of such conclusion is that *Gunter* is in no way controlling in interpreting the common law of *D'Oench.*

A case subsequent to *Gunter, FDIC v. Gulf Life Insurance Co.*, 737 F.2d 1513 (11th Cir. 1984), expanded the *Gunter* rule a bit. In that case, the Court determined that the *Gunter* rule would apply to claims or defenses of waiver, estoppel, and unjust enrichment. *Id.* at 1518. Significantly, the issues in *Gulf Life,* like *Gunter*, did not concern any side agreements. *Id.* at 1516. Therefore, *Gulf Life* also has no impact on the meaning of *D'Oench.*

For purposes of Plaintiffs' fault argument, the immediate conclusion is that the *Powers* Court's statement that

"*D'Oench* has been applied to bar defenses apparently not attributable to the conduct of defendants" is not correct for two reasons: 1) the statement was based on *Gunter*, and 2) *Gunter* (and *Gulf Life*) is not based on *D'Oench*. To put it another way, *Gunter* is common law, but it is a new common law rule which is separate and distinct from the doctrine of *D'Oench* for the reason that *Gunter* applies only to situations where there is no side agreement; therefore, *Gunter* and *Powers* do not say that a showing of fault is unnecessary in applying *D'Oench*.

In short, the authorities discussed in this portion of this Brief do not say that a showing of fault is unnecessary in applying *D'Oench*. At most, the authorities say that such fault does not have to rise to the level of blatant illegality.

As noted, FDIC and the Bank did not raise a single allegation as to any type of fault by BMA. Such fact is yet another example of their failure to state and apply the pertinent law. The bottom line is that a showing of fault *is required* before *D'Oench* will bar BMA's cause of action, and Appellees did not even take the first step in meeting this burden.

III.

AGREEMENTS NOT BARRED DUE TO BILATERAL OBLIGATIONS

A. Applicable law

This argument is based on *Howell v. Continental Credit Corp., supra.* A summary of the facts in that case follows. Howell owned a corporation which operated a television station. Howell sought to obtain broadcasting equipment for the station. Rather than purchase the equipment, Howell decided to lease the equipment from Continental. The par-

ties signed lease agreements, but in order for the arrangement to work, Continental had to purchase the equipment, and both parties understood that Continental would buy the equipment. Continental required a loan in order to make the purchase, and such loan was procured through Drovers Bank. The leases served as collateral. As it turned out, Continental used very little of the loan proceeds to buy the broadcasting equipment. The ensuing events caused Howell to sue Continental and Drovers. Howell argued that due to Continental's conduct the leases were invalid and that Drovers' conduct was illegal. In the course of the litigation, Drovers was declared insolvent, and the FDIC stepped in both as receiver and corporate insurer. The FDIC moved for summary judgment, claiming that the leases were valid and that Howell's claims were barred by § 1823(e) and *D'Oench*. The district court agreed, but the court of appeals reversed.

The Seventh Circuit held that neither § 1823(e) nor *D'Oench*, were applicable. The court reasoned that "where the document the FDIC seeks to enforce in one . . . which facially manifests *bilateral* obligations and serves as the basis "for a defense or claim, § 1823(e) and/or *D'Oench* are of no effect. *Id.* at 746 (emphasis in original); also cited in *FDIC v. Venture Contractors, Inc.*, 825 F.2d 143,149 (7th Cir. 1987). The rationale is that when a breach of a document which on its face imposes bilateral obligations serves as a basis of a claim or defense against the FDIC, there can be no violation of § 1823(e) or *D'Oench*, because there is no secret side agreement. *Id.* In *Howell*, the leases imposed upon Continental the obligation to buy the equipment. Continental failed to meet this obligation, and Howell's claims based on Continental's breach were allowed.

The Fifth Circuit adopted the principles of *Howell* in *McClanahan, supra*, wherein it was stated that where a note imposes bilateral obligations on the parties, the maker of the

note may defend attempted collection on the note by FDIC by claiming the bank breached its obligations under the note. *Id.* at 515.

B. Application of law to case at bar

The case at bar is similar to *Howell.* All of the agreements here involved bilateral obligations. Basically, BMA would acquire certain funds, turn them over to the Bank, and the Bank would manage and disburse the funds in such a way so as to meet BMA's obligations and keep the business alive. The very foundation of BMA's cause of action is that it met its obligations under the agreements and the Bank breached its obligations. The Bank breached the first agreement because after BMA agreed to it, the Bank refused to follow it and demand a new agreement. The subsequent agreements were breached because the Bank mismanaged and misapplied the funds entrusted to them in such a way that BMA's business basically failed. Furthermore, the agreements were all "letter agreements" meaning the agreements were *in writing.* Hence, there were no unrecorded, secret, oral agreements. These written agreements might not meet all the requirements of § 1823(e), but such fact is irrelevant. Recall that the strict, literal requirements of § 1823(e) must be followed only when the FDIC is acting in its corporate capacity. Here, the FDIC is acting only as a receiver. Just as in *Howell*, then, this case 1) involves written agreements, which 2) established bilateral obligations, and 3) the breach of those obligations serves as the basis of BMA's claims.

C. Summary

In addition to the arguments in I and II above, Plaintiffs argue that *D'Oench* is inapplicable because the agreements established bilateral obligations which were breached by the Bank.

IV.

BMA'S CLAIMS NOT BARRED BY *GUNTER* OR *GULF LIFE*

BMA has shown that the common law under *D'Oench* does not control this case. However, it is clear that *Gunter, supra*, and *Gulf Life, supra*, establish another possible basis for barring BMA's claims. Even though FDIC and the Bank put forth no arguments other than those based on § 1823(e) and *D'Oench* BMA feels it is necessary to further explain why *Gunter* and *Gulf Life* are likewise inapplicable.

First of all, the *Gunter/Gulf Life* rule is very narrow. It applies only to actions concerning notes purchased by FDIC through a purchase and assumption transaction. BMA has shown that this action is not one on a note. BMA is not trying to avoid a debt, nor are FDIC and the Bank claiming a debt is owed. Also, as discussed in this brief, there is a chance there is no outstanding debt to the Bank, meaning there is no note, meaning there is no way the *Gunter/Gulf Life* rule applies. Furthermore, there is currently no way of knowing if a purchase and assumption transaction took place in this case, and even if one did occur, there is no evidence regarding the terms of such transaction. In other words, there is no proof that there was a note for the FDIC to acquire, nor is there any proof that any such note was purchased through a purchase and assumption agreement.

Secondly, an additional requirement of the *Gunter/Gulf Life* rule precludes its application. In order to fully realize the import of this additional requirement, one must know the reason for the *Gunter/Gulf Life* rule. The purpose of the rule is to allow the FDIC to quickly reach a decision as to whether a purchase and assumption transaction is a better alternative

to liquidation of a failed bank. *Gulf Life, supra* at 1518; *Gunter, supra* at 869-870. As stated in *Gunter,*

> If the FDIC's right to collect on returned assets, however, were subject to fraud claims of which the FDIC lacked knowledge, estimating its potential loss from a purchase and assumption would be impossible. *Gunter, supra* at 870.

The Court in *Gulf Life* adopted this same reasoning and applied it to issues of waiver, estoppel, and unjust enrichment. However, *Gulf Life* shed light on another aspect of the knowledge requirement, namely the requirement of FDIC knowledge *at the time* the purchase and assumption transaction is executed. The Court, given the purpose of and need for the *Gunter/Gulf Life* rule, stated that to the extent the FDIC knows of a defense or claim prior to the execution of a purchase and assumption agreement, its ability to determine the propriety of such agreement is not impaired; therefore, if the FDIC subsequently enters a purchase and assumption agreement, the FDIC is subject to the defense or claim. *Gulf Life, supra.*

In the case at bar, assuming that this action involves an asset acquired by FDIC through a purchase and assumption agreement, there can be no doubt the FDIC had actual knowledge of BMA's claims prior to entering into such purchase and assumption agreement. BMA filed the present suit on April 25, 1988. (R. 0006). The Bank was declared insolvent on July 29, 1988. (R. 0017). Therefore, BMA's claims were made known three months prior to any time the FDIC could even consider entering into a purchase and assumption agreement. The claims were served on the Bank, meaning that the FDIC had to have knowledge of BMA's claims prior to entering a purchase and assumption agreement (if one in fact occurred). Consequently, the common law rule of *Gunter* and *Gulf Life* is inapplicable.

V.

BMA'S AFFIRMATIVE CLAIMS ARE NOT BARRED

BMA's argument on this issue is very simple. Under FDIC's and the Bank's argument and analysis below, for affirmative claims against the FDIC to be barred, they must be based on agreements barred by *D'Oench* and/or § 1823(e). BMA has shown above that the agreements in the case at bar are not prohibited by *D'Oench* or § 1823(e). Therefore, Appellees' argument fails.

VI.

BMA'S CLAIMS ARE NOT BARRED AS TO NCNB

Appellees' argument below that BMA's claims are barred as to NCNB likewise fails because it is totally dependent on *D'Oench* and § 1823(e). Since those doctrines are not applicable, Appellees' argument is without merit.

CONCLUSION

Any analysis of the cases cited by the parties and the facts of this case show that the Bank's and FDIC's Motion To Dismiss should have been denied for the following reasons:

1. The agreements in this case are not barred because they did not alter the terms of BMA's "outstanding" debt to the Bank, meaning that the Bank's records regarding one of its assets were not altered.

2. The agreements are not barred because the agreements, had they been carried out, would not have defeated or diminished the Bank's and hence the FDIC's, interest in its asset.

3. It appears there is no asset which could be affected by this suit.

4. The agreements are not barred because BMA did not commit any kind of fault.

5. The agreements are not barred because they established bilateral obligations, and it is the Bank's breach of these obligations which serves as the basis for BMA's claims.

6. Given 1-4, the agreements are not barred by *D'Oench* or § 1823(e); therefore, BMA's claims based on the agreements are not barred.

7. BMA's claims are not barred by *Gunter, supra,* or *Gulf Life, supra.*

8. Consequently, BMA's affirmative claims are not barred as to the FDIC or the Bank.

As a result of the foregoing analysis and conclusions, BMA submits that the District Court erred in dismissing BMA's suit for failure to state a claim, and respectfully requests this Court to reverse the District Court's Order of Dismissal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Response has been mailed certified, returned receipt requested to William Frank Carroll, Attorney For Defendants, 500 Trammel Crow Center, 2001 Ross Avenue, Dallas, Texas 75201-2916, on this 27th day of September, 1989.

JOSEPH E. ASHMORE, JR.
JOSEPH E. ASHMORE, JR.

No. 89-1719
Summary Calendar

United States Court of Appeals

Fifth Circuit
Feb. 21, 1990

Bell & Murphy and Associates, Inc.,
John W. Bell, Jr.,
Harold D. Barnett,
Robert D. Hamer, Jr., and
Richard L. Mears,

Plaintiffs — Appellants,

v.

Interfirst Bank Gateway, N.A.
and Charles E. Jobe,

Defendants — Appellees

Bank's customer brought action against bank based upon letter agreement pursuant to which bank was to extend open credit loans and honor certain checking account overdrafts in exchange for customer's surrender of its accounts receivable and funds from its pension and profit sharing plan to bank. The Federal Deposit Insurance Corporation (FDIC), intervening as receiver for insolvent bank, removed case to federal court. The United States District Court for the Northern District of Texas, at Fort Worth, Eldon B. Mahon, J., dismissed claims as barred by doctrine of *D'Oench, Duhme,* and appeal was taken. The Court of Appeals, Jerrey E. Smith, Circuit Judge, held that: (1) unrecorded letter agreement was not enforceable against FDIC, and (2) *D'Oench, Duhme* rule applied to "bridge bank" authorized by FDIC to acquire assets and liabilities of failed bank.

Affirmed.

1. Federal Courts — 797

When reviewing dismissal of claim for failure to state claim, Court of Appeals, like district court, must accept material allegations of complaint as true and construe them in light most favorable to nonmoving party. Fed. Rules Civ. Proc. Rule 12(b)(6), 28 U.S.C.A.

2. Banks and Banking — 505

Although Federal Deposit Insurance Corporation (FDIC) when acting in its receiver capacity cannot rely upon statutory protection given FDIC in its corporate capacity, FDIC in its receiver capacity is entitled to protection of common law *D'Oench, Duhme* rule which estops borrower from asserting against FDIC defense based upon secret or unrecorded side agreements that alter terms of facially unqualified obligations. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

3. Banks and Banking — 505

D'Oench, Duhme rule, which precludes borrower from asserting against Federal Deposit Insurance Corporation (FDIC) defenses that are based upon secret or unrecorded side agreements that alter terms of facially unqualified obligations, bars not only claims or defenses based upon agreements that defeat FDIC's interests in specific asset acquired by bank, but also, affirmative claims based upon unrecorded agreements to extend future loans.

4. Banks and Banking — 505

Agreement under which customer was to surrender its accounts receivable and funds from its pension and profit sharing plans to bank, in return for which bank was to extend open corporate loans and to honor certain checking account overdrafts, thereby enabling customer to stay in business, was

unenforceable under *D'Oench, Duhme* doctrine against Federal Deposit Insurance Corporation (FDIC) acting in its receiver capacity, where agreement was embodied in letter which was not contained in bank's records.

5. Banks and Banking — 505

D'Oench, Duhme doctrine which prohibits enforcement of side agreements against Federal Deposit Insurance Corporation (FDIC) applies not only to claims or defenses based upon illegal side agreements entered into for purposes of deceiving bank authorities, but also to borrowers who are innocent of any wrongdoing.

6. Banks and Banking — 505

Exception to *D'Oench, Duhme* doctrine, for bilateral agreements made by failed banks was inapplicable to letter agreement entered into by bank's customer and bank, where alleged bilateral agreement which customer sought to enforce against Federal Deposit Insurance Corporation (FDIC) in its receiver capacity was unrecorded.

7. Banks and Banking — 505

D'Oench, Duhme rule, which precludes asserting against Federal Deposit Insurance Corporation (FDIC) defenses based upon secret or unrecorded side agreements that alter terms of facially unqualified obligations, extends to bridge bank authorized by FDIC to acquire assets and liabilities of failed bank.

Joseph E. Ashmore, Jr., Gregory Shamoun, Vassallo & Ashmore, Dallas, Tex., for plaintiffs-appellants.

Bruce L. Collins, William Frank Carroll, John Mitchell Nevins, Baker, Mills & Last, Dallas, Tex., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before WILLIAMS, SMITH and DUHÉ, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Bell & Murphy and Associates, Inc., and four of its employees (collectively, "Bell & Murphy") filed suit in Texas state court against First RepublicBank Dallas, N.A. ("Republic"), and Republic officer Charles E. Jobe, seeking monetary damages for alleged fraudulent misrepresentations by the bank. The Federal Deposit Insurance Corporation ("FDIC") intervened as receiver for the insolvent Republic, removed the case to federal district court, and then successfully moved to dismiss Bell & Murphy's claims as barred by the doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). We affirm.

I.

[1] Like many companies in the oil and gas industry, Bell & Murphy fell upon hard times in 1985.[1] Severe "cash flow" difficulties prompted the company to seek assistance from Republic, its longtime bank, and to agree to an arrangement suggested by bank officer Charles E. Jobe. Under the terms of that agreement, Bell & Murphy was to surrender its accounts receivable and funds from its pension and profit sharing plans to the bank; in return, the bank was to extend open corporate loans and to honor certain checking account overdrafts, thereby enabling Bell & Murphy to stay in business. This

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[1] We state the facts as alleged in Bell & Murphy's complaint. This is appropriate, because when reviewing a Fed.R.Civ.P. 12(b)(6) dismissal we, like the district court, must accept the material allegations of the complaint as true and construe them in the light most favorable to the non-moving party. *See, e.g., Reid v. Hughes*, 578 F.2d 634, 637 (5th Cir.1978).

agreement was embodied in a letter from Jobe to Bell & Murphy, but it was nor reflected in Republic's records.

In April 1988, Bell & Murphy filed suit against Republic[2] in Texas state court, alleging that the bank had induced it to enter the agreement through fraudulent misrepresentations and then had breached its obligations under the agreement. Republic was declared insolvent in July 1988, and the FDIC was appointed as receiver pursuant to 12 U.S.C. § 1821(c). NCNB Texas National Bank, N.A. ("NCNB"), was then named by the FDIC to act as the "bridge bank" to acquire a portion of the assets and liabilities of the failed Republic.[3]

The FDIC then intervened in this action and removed it to federal district court, basing jurisdiction upon 12 U.S.C. § 1819. After considering extensive briefing by both sides, the district court concluded that even if Bell & Murphy's allegations were true, its claims were barred as to the FDIC and NCNB by the *D'Oench, Duhme* doctrine. The court therefore granted the defendants' motion to dismiss.

II.

A.

We begin our review of the judgment below with a brief discussion of the history and purposes of the *D'Oench, Duhme* rule. in *D'Oench, Duhme,* the defendant executed a note in favor of a bank in order to deceive state regulators by falsely inflating the value of the bank's assets. The defendant and the bank had agreed that the note would not be called for

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[2] Jobe also was named as a defendant, but Bell & Murphy does not appeal the judgment in his favor.

[3] *See* 12 U.S.C. § 1821(n), authorizing the FDIC's use of bridge banks to acquire the assets and liabilities and to continue the normal banking operations of insolvent banks.

payment, but, for obvious reasons, this agreement was not reflected in the bank's records. Some years later, the bank obtained a loan from the FDIC, which took a security interest in the defendant's note. When the bank failed and the FDIC sued to collect on the note, the defendant raised the side agreement and also asserted that the note was invalid because it had been given without consideration.

The Supreme Court examined the statutory scheme that created the FDIC and concluded that it evidenced a "federal policy to protect .... [the FDIC] and the public funds which it administers, against misrepresentations as to ... the assets in the portfolios of the banks which ... [the FDIC] insures or to which it makes loans." *D'Oench, Duhme,* 315 U.S. at 457, 62 S.Ct. at 679. In order to effect this federal policy, the Court fashioned a common law rule of estoppel precluding a borrower from asserting against the FDIC defenses based upon secret or unrecorded "side agreements" that altered the terms of facially unqualified obligations.

[2] Congress later ratified the result in *D'Oench, Duhme* by enacting 12 U.S.C. § 1823(e), which affords the FDIC, when acting in its corporate capacity, comprehensive protection against any

> ... agreement which tends to diminish or defeat ... [its] interest ... in any asset acquired by it ... unless such agreement (1) is in writing, (2) was executed by the depository institution and ... the obligor, contemporaneously with the acquisition of the asset by the depository institution, (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) has been, continuously, from the time of its execution, an official record of the depository institution.

Although the FDIC may not rely upon the enumerated requirements of section 1823(e) where, as here, it acts as receiver rather than in its corporate capacity, *see FDIC v. McClanahan*, 795 F.2d 512, 516 (5th Cir. 1986), it is nonetheless entitled to the protection of the common law *D'Oench, Duhme* rule. *See Beighley v. FDIC*, 868 F.2d 776, 783 (5th Cir.1989). With this background in mind, we now examine each of Bell & Murphy's efforts to take its claims outside the scope of the *D'Oench, Duhme* doctrine.

B.

[3] Bell & Murphy first advances the argument that the *D'Oench, Duhme* rule bars only claims or defenses based upon unrecorded side agreements that defeat the FDIC's interest in a *specific asset* acquired from a bank. According to Bell & Murphy, the side agreement at issue here, while affecting Republic's total worth, does not diminish the value of Bell & Murphy's admitted outstanding debt to Republic. The side agreement thus could not have misled the FDIC regarding the value of Republic's assets, and *D'Oench, Duhme* does not preclude Bell & Murphy from asserting that side agreement against the FDIC.

[4] We find this inventive argument to be meritless in light of our recent holding in *Beighley* that the *D'Oench, Duhme* rule bars affirmative claims based upon unrecorded agreements to extend future loans. There, we noted that the "alleged oral agreement to finance future loans . . . [was] not clearly evidenced in the bank's records, and would not . . . [have been] apparent to bank examiners." 868 F.2d at 784. Although the agreement that Bell & Murphy seeks to enforce against the FDIC allegedly is embodied in a letter, it was not contained in Republic's records. Thus, it could not have been discovered by bank examiners and is not enforceable against the FDIC.

[5] We can dispense easily with Bell & Murphy's contention that the *D'Oench, Duhme* rule bars only claims or defenses based upon *illegal* side agreements entered into for the purpose of deceiving banking authorities. Although the obligor in *D'Oench, Duhme* was in fact a knowing participant in such a fraudulent scheme, the Court there suggested that even a borrower who was "very ignorant and ill-informed of the transaction" and did not "intend[ ] to deceive any person" would likewise be precluded from asserting defenses based upon unrecorded side agreements that altered the terms of a facially unqualified note. *D'Oench, Duhme,* 315 U.S. at 458-59, 62 S.Ct. at 679-80.

Moreover, courts in numerous subsequent decisions have applied the *D'Oench, Duhme* rule in cases in which the borrower was innocent of any wrongdoing, holding that the relevant question is not whether the secret agreement was itself fraudulent or whether the borrower intended to deceive banking authorities, but rather whether the borrower "lent himself to a scheme or arrangement" whereby those authorities were likely to be misled. E.g., *Beighley,* 868 F.2d at 784 (quoting *D'Oench, Duhme,* 315 U.S. at 460, 62 S.Ct. at 681). The *D'Oench, Duhme* doctrine thus favors the interests of depositors and creditors of a failed bank, who cannot protect themselves from secret agreements, over the interests of borrowers, who can. *See Langley v. FDIC,* 484 U.S. 86, 94, 108 S.Ct. 396, 402, 98 L.Ed.2d 340 (1987); *McClanahan,* 795 F.2d at 916.

Hence, it is irrelevant to the applicability of the *D'Oench, Duhme* rule whether Bell & Murphy acted in good faith and even whether Bell & Murphy was "coerced," under "economic duress," into accepting the terms of the agreement proposed by Republic. Bell & Murphy could have protected itself by insisting that the bank properly record the agreement; because it did not, it is estopped from asserting any

claims arising out of the bank's alleged secret promise to make future loans.

[6] Relying heavily upon *Howell v. Continental Credit Corp.*, 655 F.2d 743 (7th Cir.1981),[4] Bell & Murphy next contends that the *D'Oench, Duhme* doctrine does not bar its claims because they are based upon the breach of an agreement that imposes obligations upon *both* parties. While *Howell* indeed does contain somewhat expansive language to the effect that the FDIC is bound by bilateral agreements made by failed banks, a close reading of that decision reveals that the bilateral obligations at issue there appeared on the face of the written, properly recorded agreement which the FDIC sought to enforce.

In *Howell*, a bank promised to purchase certain equipment which it would then lease to Howell. The various leases, which were contained in the bank's records, clearly manifested the bank's obligation to obtain title to the equipment. When the FDIC sued Howell to collect payments due under the leases, Howell sought to defend on the ground that the bank in fact had never obtained title to the equipment and that she had never leased it. The court concluded that Howell should be allowed to present this defense, finding *D'Oench, Duhme* inapplicable where "the document the FDIC seeks to enforce is one, such as the leases here, which *facially manifests* bilateral obligations and serves as the basis of the lessee's defense." *Howell*, 655 F.2d at 746 (emphasis added). *See also FDIC v. O'Neil*, 809 F.2d 350, 354 (7th Cir.1987) (noting that the dispositive fact in *Howell* was that "[t]he conditions that Mrs. Howell sought to enforce against the FDIC's asset . . . appeared in the asset itself . . .").

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[4] *Howell* was cited approvingly by this circuit in *McClanahan*, 795 F.2d at 515.

Here, the alleged bilateral agreement which Bell & Murphy seeks to enforce against the FDIC is unrecorded. Therefore, the narrow exception recognized in *Howell* does not take Bell & Murphy's claims outside the scope of *D'Oench, Duhme*.

(7) Finally, Bell & Murphy asserts that *D'Oench, Duhme* protections, even if applicable, do not bar a recovery against NCNB, the bridge bank authorized by the FDIC to acquire the assets and liabilities of the failed Republic. However, we agree with the FDIC that failure to extend *D'Oench, Duhme* protection to bridge banks would undermine the effectiveness of bridge banks as a means of continuing the normal banking operations, and thereby protecting the depositors and creditors, of a failed bank. Moreover, our holding in *FSLIC v. Murray*, 853 F.2d 1251, 1256 (5th Cir.1988), that the *D'Oench, Duhme* rule provides holder-in-due-course status to the FDIC compels the conclusion that assignees of the FDIC also enjoy protection from claims or defenses based upon unrecorded side agreements.[5] Accordingly, we hold that claims barred as to the FDIC by the *D'Oench, Duhme* doctrine likewise are barred as to bridge banks authorized by the FDIC to take over the operations of a failed bank.

In sum, we agree with the district court that even if Bell & Murphy's allegations are true, they do not state a claim upon which relief can be granted against either the FDIC or NCNB. Accordingly, the judgment of the district court dismissing Bell & Murphy's claims pursuant to Rule 12(b)(6) is AFFIRMED.

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[5] *See also FDIC v. Newhart*, 713 F.Supp. 320, 324 (W.D.Mo.1989) (subsequent holder of note acquired from FDIC also acquires FDIC's holder-in-due-course status); *RSR Properties, Inc. v. FDIC*, 706 F.Supp 524, 531 (W.D.Tex.1989) (claims barred as to FDIC are equally barred as to bridge bank NCNB because of FDIC's holder-in-due-course status).

(3)

No. 89-1893

In the Supreme Court of the United States

OCTOBER TERM, 1990

BELL & MURPHY AND ASSOCIATES, INC.,
ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.,
ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners may not pursue a claim for relief based on an unrecorded side agreement with a failed bank.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 879 F.2d 754. The order and judgment of the district court (NCNB Br. in Opp. App. A76-A77) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A10) was entered on February 21, 1990. The petition for a writ of certiorari was filed on May 22, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. When Bell & Murphy and Associates, Inc. (Bell & Murphy), a company engaged in the oil and gas industry, experienced severe financial difficulties in 1985, the company sought assistance from First RepublicBank Dallas (First Republic). Petitioners (Bell & Murphy and four of its employees) allege that, on account of the duress engendered by the company's financial problems, they agreed to a plan proposed by bank officer Charles Jobe. Under Jobe's plan, Bell & Murphy surrendered its accounts receivable and funds from its pension and profit sharing plans to First Republic, and the bank agreed to extend existing corporate loans and to honor certain checking account overdrafts. The agreement allegedly was embodied in a letter signed by Jobe, but neither the letter nor any reference to the agreement was reflected in the bank's books and records. Pet. App. A4.

In April 1988, petitioners filed suit against First Republic and Jobe in Texas state court, alleging that Jobe had coerced them into entering into the agreement through fraudulent misrepresentations and that the bank had breached its obligations under the terms of the agreement. In July 1988, First Republic was declared insolvent by the Comptroller of the Currency and respondent Federal Deposit Insurance Corporation was appointed receiver. Respondent NCNB Texas National Bank was then selected by the FDIC to serve as the manager of the "bridge bank" and thus to acquire a portion of the assets and liabilities of the failed bank. Pet. App. A4.

The FDIC and NCNB subsequently intervened as defendants in petitioners' action against First Republic and removed it to federal district court. The

defendants then moved to dismiss the action, arguing that, under *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), petitioners are barred from asserting any claims arising out of First Republic's alleged secret promise to make future loans. The district court agreed and dismissed the action for failure to state a claim. NCNB Br. in Opp. App. 76-77.

2. The court of appeals affirmed, also relying on *D'Oench, Duhme*. In that case, the court of appeals explained, "the Court fashioned a common law rule of estoppel precluding a borrower from asserting against the FDIC defenses based upon secret or unrecorded 'side agreements' that altered the terms of facially unqualified obligations." Pet. App. A5.[1] The purpose of the rule against the enforcement of side agreements is " 'to protect . . . [the FDIC] and the public funds which it administers, against misrepresentations as to . . . the assets in the portfolios

[1] The result in that case, the court noted, was "later ratified" by Congress when it enacted 12 U.S.C. 1823(e). Section 1823(e) provides that "[n]o agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it * * * shall be valid against the Corporation unless such agreement (1) is in writing, (2) was executed * * * contemporaneously with the acquisition of the asset by the depository institution, (3) was approved by the board of directors of the depository institution or its loan committee * * *, and (4) has been, continuously, from the time of its execution, an official record of the depository institution." Financial Institutions Reform, and Enforcement Act of 1989, Pub. L. No. 101-73, § 217, 103 Stat. 256. The court added that, prior to the 1989 amendment of Section 1823(e), the FDIC could not "rely upon the enumerated requirements of section 1823(e) where, as here, it acts as receiver rather than in its corporate capacity." Pet. App. A6. The court stated that the FDIC "is nonetheless entitled to the protection of the common law *D'Oench, Duhme* rule." *Ibid.*

of the banks which . . . [the FDIC] insures or to which it makes loans.'" *Ibid.* (quoting 315 U.S. at 457). The court of appeals accordingly recognized that, since petitioners allege that they sustained damages in connection with an unrecorded side agreement, their claim is barred under *D'Oench, Duhme* in the absence of an exception to its rule against enforcing unrecorded side agreements. The court held, contrary to petitioners' contentions, that no differences between this case and *D'Oench, Duhme* justify the creation of an exception here.

The court first rejected petitioners' claim that this case is distinguishable because no "specific asset" of the FDIC was diminished in value as a result of their claim. In *D'Oench, Duhme*, the FDIC sought to collect on a note that it had obtained from a bank, and the defendant resisted on the ground that the bank had secretly agreed never to enforce the note; thus, a specific asset (the note) would have had no value under the side agreement. Here, petitioners contend, there is no specific asset that would be diminished in value—although the total value of the bank's assets would, of course, be diminished to the extent that petitioners collect on their claims—and that *D'Oench, Duhme* is distinguishable on that ground. The court of appeals held "this inventive argument to be meritless in light of our recent holding in *Beighley* [v. *FDIC*, 868 F.2d 776 (5th Cir. 1989),] that the *D'Oench, Duhme* rule bars affirmative claims based upon unrecorded agreements to extend future loans." Pet. App. A6-A7. The court explained that the reason for the holding in *D'Oench, Duhme* was that bank examiners must be able to ascertain a bank's assets from its records. Since the agreement on which petitioners base their claims

"was not contained in Republic's records, * * * it could not have been discovered by bank examiners and is not enforceable against the FDIC." *Id.* at A7.

The court of appeals next rejected petitioners' argument "that the *D'Oench, Duhme* rule bars only claims or defenses based upon *illegal* side agreements entered into for the purpose of deceiving banking authorities." Pet. App. A7. The court noted that although the obligor in *D'Oench, Duhme* was a knowing participant in a fraudulent scheme, this Court stated that even a borrower who was "very ignorant and ill-informed of the transaction" and did not "intend[] to deceive any person" would be precluded from relying on unrecorded side agreements. *Ibid.* (quoting 315 U.S. at 458-459). Relying on *Langley* v. *FDIC*, 484 U.S. 86, 94 (1987), the court of appeals concluded that "[t]he *D'Oench, Duhme* doctrine * * * favors the interests of depositors and creditors of a failed bank, who cannot protect themselves from secret agreements, over the interests of borrowers, who can." Pet. App. A7. Because petitioners could have protected themselves by insisting that the bank properly record the alleged side agreements, but did not, the court of appeals held that petitioners are estopped from asserting any claim arising out of the secret agreement. *Id.* at A7-A8.

The court of appeals also rejected petitioners' claim that they may enforce the unrecorded agreement under *Howell* v. *Continental Credit Corp.*, 655 F.2d 743 (7th Cir. 1981), because it was a valid "bilateral agreement." The court noted that *Howell* involved a "properly recorded agreement," while "the alleged bilateral agreement which [petitioners]

seek[] to enforce against the FDIC is unrecorded." Pet. App. A8, A9.[2]

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court is particularly unwarranted on account of the 1989 amendments to the national banking laws, which confirm that unrecorded side agreements are not enforceable.

1. The court of appeals applied *D'Oench, Duhme* in a straightforward manner, and correctly concluded that its rule is applicable in this case because the alleged agreement that petitioners seek to enforce was never recorded in the bank's books and records. Petitioners suggest, almost in passing, that the court of appeals erred in distinguishing this case from *Howell* on the basis that the agreement in that case had been recorded, alleging that the evidence here did not show that the agreement was unrecorded. Pet. 27. But the court of appeals found that the agreement "was not contained in Republic's records" (Pet. App. A7) and the district court like-

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[2] In addition, the court held, relying on *FSLIC* v. *Murray*, 853 F.2d 1251 (5th Cir. 1988), that petitioners may not pursue their claim against NCNB because, as a bridge bank, it is entitled to holder-in-due-course status. The court explained that "failure to extend *D'Oench, Duhme's* protection to bridge banks would undermine the effectiveness of bridge banks as a means of continuing the normal banking operations, and thereby protecting the depositors and creditors, of a failed bank." Pet. App. A9. Petitioners have not challenged that holding. Nor did they appeal from the district court's judgment in favor of Jobe, the bank officer who allegedly fraudulently induced them to enter into the agreement. *Id.* at A4 n.2.

wise dismissed on the basis of *D'Oench, Duhme* (NCNB Br. in Opp. App. A76-A77). There is no warrant for this Court to reconsider the factual findings of the two lower courts.

Petitioners primarily renew their contention (Pet. 12-21), which the court of appeals termed "inventive" (Pet. App. A6), that the rule against the enforcement of unrecorded side agreements should not be applied in this case because no "specific asset" (but, instead, the failed bank's total assets) would be affected. As the court of appeals held, petitioner's alleged distinction makes no sense. The essence of the holding in *D'Oench, Duhme* is that a person dealing with an institution insured by the FDIC may not assert a claim or defense against the FDIC based upon an unrecorded side agreement with a failed bank because the agreement may have had the effect of deceiving the banking authorities, and there is no reason why it should matter whether the side agreement compromises specific assets or the total assets of a failed bank. As this Court recognized in *Langley*, bank examiners must be able "to rely on a bank's records in evaluating the worth of the bank's assets," and when evaluating a failing bank they must make decisions "with great speed." 484 U.S. at 91. There is no room in this process for the enforcement of secret agreements. Accordingly, no court has held that there is merit to the distinction petitioner suggests. To the contrary, as the court of appeals stated (Pet. App. A6-A7), the court in *Beighley* specifically held that "affirmative claims based upon unrecorded agreements to extend future loans" are barred.

Petitioners also contend (Pet. 21-27) that their side agreement should be enforceable in the absence of a showing that they were at fault, by which they mean that they affirmatively intended to deceive bank

examiners or negligently entered into such a scheme. Whether someone intended to deceive banking authorities is not, however, the relevant inquiry. To the contrary, what matters is whether the unrecorded agreement could have had the effect of misleading other borrowers or bank examiners, as the court of appeals concluded. By failing to ensure that the agreement was recorded, Bell & Murphy "lent [itself] to a *scheme or arrangement* whereby the banking authority . . . was likely to be misled." *Langley*, 484 U.S. at 92 (quoting *D'Oench*, *Duhme*, 315 U.S. at 460).[3]

2. In any event, review is not warranted because of changes in the banking laws enacted by Congress through the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183. As the court of appeals noted (see Pet. App. A6 and note 1, *supra*), prior to 1989, 12 U.S.C. 1823(e) applied only when the FDIC was acting in its corporate capacity and not when it is

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[3] Petitioners allege (Pet. 21) a conflict with *FDIC* v. *Meo*, 505 F.2d 790, 793 (9th Cir. 1974), where a defendant who was "innocent of any wrongdoing or negligence" was not barred from asserting a defense in an action by the FDIC to collect on a note. However, that case is very different from this case. In *Meo*, the defendant gave the bank the note in return for shares of the bank's common stock, but the bank failed to issue common stock to the defendant. When the FDIC subsequently sought to enforce the note, the court allowed the defendant to assert failure of consideration as a defense. While the court's decision contains broad language, it has never been applied to permit anyone to pursue a claim based on an unrecorded side agreement. To the contrary, the Ninth Circuit has construed *Meo* narrowly. See *FDIC* v. *Bank of San Francisco*, 817 F.2d 1395, 1398-1399 (1987); *FDIC* v. *First Nat'l Finance Co.*, 587 F.2d 1009, 1011-1012 (1978).

acting as a receiver. But Section 1823(e) was amended in 1989 to apply as well when, as here, the FDIC is acting "as receiver of any insured depository institution." In addition, Congress added 12 U.S.C. 1821(d)(9)(A), which states that "any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim aaginst the receiver or the Corporation."[4] § 212, 103 Stat. 231.

Petitioners acknowledged in the court of appeals that the side agreement they seek to enforce "might not meet all the requirements of § 1823(e)." NCNB Br. in Opp. App. A108. Indeed, of the four requirements set forth in that provision (see note 1, *supra*), the agreement appears only to satisfy the requirement that it be "in writing." The side agreement plainly fails to meet the fourth requirement of Section 1823(e)—that the agreement "has been, continuously, from the time of its execution, an official record of the depository institution." Accordingly, in the future there will be no question that claims such as those brought by petitioners are barred.

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[4] In addition, Congress added 12 U.S.C. 1821(n)(4)(I), which expressly extends the same protections to bridge banks. § 214, 103 Stat. 249.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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